

NORTH CAROLINA
COURT OF APPEALS
REPORTS

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 4. Resigned 30 June 2013.
 5. Resigned 8 August 2013.

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CASES
ARGUED AND DETERMINED IN THE
COURT OF APPEALS
OF
NORTH CAROLINA
AT
RALEIGH

ALICIA DANIELLE MOSTELLER, PLAINTIFF V. DUKE ENERGY CORPORATION, A
NORTH CAROLINA CORPORATION; DUKE ENERGY CAROLINAS, LLC, A NORTH
CAROLINA LIMITED LIABILITY COMPANY; AND WILLIAM RAY WALKER, DEFENDANTS

No. COA09-277

(Filed 7 September 2010)

**1. Appeal and Error— statement of facts—rules violations—
not a substantial failure**

The merits of plaintiff's appeal were considered despite appellate rules violations concerning the statement of facts where the violations did not impair the task of review and did not rise to the level of a gross violation.

**2. Negligence— highway utility pole—placement not negli-
gence per se**

The trial court did not err by granting defendant's Rule12(b)(6) motion to dismiss a claim for negligence *per se* in which plaintiff sought damages for injuries suffered when the car in which she was a passenger went off a road and struck a Duke Energy utility pole. The North Carolina Department of Transportation (NCDOT) has the duty and responsibility to consider all of the relevant factors at each location and to establish where utility structures should be located. Without an allegation that NCDOT had determined that the utility pole was in an unapproved location, plaintiff did not adequately plead that her injuries were proximately caused by defendant's negligence *per se*.

MOSTELLER v. DUKE ENERGY CORP.

[207 N.C. App. 1 (2010)]

3. Negligence— placement of utility pole—not ordinary negligence

The trial court did not err by granting defendant's Rule 12(b)(6) motion to dismiss plaintiff's ordinary negligence claim for injuries suffered when the car in which she was riding went off the road and struck a Duke Energy utility pole. The maintenance of a utility pole does not constitute negligence unless the pole is a hazard to those using the highway in a proper manner. Here, the negligence of the driver in leaving the roadway was an intervening proximate cause.

Appeal by plaintiff from order entered 4 December 2008 by Judge Nathaniel J. Poovey in Superior Court, Gaston County. Heard in the Court of Appeals 30 September 2009.

Brown, Moore & Associates, PLLC, by Jon R. Moore, for plaintiff-appellant.

Parker Poe Adams & Bernstein LLP, by John W. Francisco, for defendant-appellee Duke Energy Carolinas, LLC.

STROUD, Judge.

Alicia Danielle Mosteller ("plaintiff") was seriously injured when the car in which she was a passenger ran off of the roadway to avoid an oncoming vehicle and hit a utility pole located within the right of way. She filed a complaint alleging negligence against both defendant William Ray Walker, the driver, and defendant Duke Energy and negligence *per se* against defendant Duke Energy. The trial court dismissed her complaint with prejudice pursuant to Rule 12(b)(6) for failure to state a claim upon which relief may be granted. The issue on appeal is whether plaintiff's complaint sufficiently pled a claim for negligence or negligence *per se* as to defendant Duke Energy regarding the location and maintenance of the utility pole within the highway right of way. Even if the location of the utility pole was in violation of safety regulations administered by NC DOT, plaintiff has not alleged that NC DOT ever made any determination as to the proper location for the utility pole under the applicable regulations, so plaintiff's negligence *per se* claim fails. Because the negligence of defendant Walker was the intervening proximate cause of plaintiff's injuries, plaintiff's claims of ordinary negligence against Defendant Duke Energy also fail, so we affirm the trial court's dismissal of plaintiff's complaint.

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I. Factual Background

Plaintiff's complaint, which must be "taken as true" on a motion to dismiss for failure to state a claim, *Embree Constr. Group, Inc. v. Rafcor, Inc.*, 330 N.C. 487, 490, 411 S.E.2d 916, 919-20 (1992), alleged that at approximately 7:07 p.m. on 13 February 2005, plaintiff was riding as a passenger in a vehicle operated by defendant William Ray Walker ("defendant Walker"¹) traveling southbound on Belmont-Mount Holly Road, between Interstate 85 and Woodlawn Road, in Belmont, North Carolina. Defendant Walker overreacted to an oncoming vehicle which came into his lane of travel, and he drove the vehicle off the right side of the road in a left curve, striking a utility pole ("the subject utility pole") located in the right-of-way, approximately twelve-and-a-half feet off the right side of the paved roadway. Among other injuries, plaintiff sustained a fracture of her cervical spine resulting in quadriplegia.

Defendant Duke Energy Corporation and its subsidiary Duke Energy Carolinas, LLC ("defendant Duke Energy"²) owned, installed, and maintained the subject utility pole which defendant Walker's vehicle hit. Other vehicles had also hit the subject utility poles or its predecessor poles, including guide wires, during the eight years prior to 13 February 2005. Plaintiff's complaint incorporates accident reports from three prior automobile accidents involving the subject utility pole or predecessor poles, in 1997, 2001, and 2003. The subject utility pole was a replacement utility pole installed at the same location as the original pole within the same utility line running on the western side of Belmont-Mount Holly Road.

Plaintiff's complaint incorporated portions of various publications which address design standards for roadways, particularly as to the placement of utility structures within the right of way. For example, "A Guide for Accommodating Utilities on Highway Rights-of-Way," published in 1970 by the American Association of State Highway Officials ("AASHO") states that:

On and along conventional highways in rural areas poles and related facilities should be located at or as near as practical to the right-of-way line. As a minimum, the poles should be located out-

1. Defendant Walker is not a party to this appeal, as plaintiff executed a "Covenant Not to Enforce Judgment" against defendant Walker on or about 27 April 2007, and defendant Walker did not file a brief in this appeal.

2. As defendants' brief refers to Duke Energy Carolinas LLC as successor-in-interest to Duke Energy Corporation and one brief was submitted on behalf of both entities, we will refer to both corporations collectively as "defendant Duke Energy."

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side the clear roadside area for the highway section involved. There is no single minimum dimension for the width of a clear roadside area but, where there is sufficient border space, 30 feet is commonly used as a design safety guide.

Language similar to the above guideline as recommended by AASHO in 1970 was used in “Policies and Procedures for Accommodating Utilities on Highway Rights of Way[,]” adopted by the North Carolina Department of Transportation (“NC DOT”) Division of Highways in 1975 (“the 1975 NC DOT manual”). The 1975 NC DOT manual states that, “Poles and related facilities on and along conventional highways in rural areas shall be located at or as near as practical to the right-of-way line.”

Also incorporated into plaintiff’s complaint is the affidavit of Gary Spangler, NC DOT District Engineer for the district which includes Gaston County, North Carolina. Mr. Spangler’s affidavit states in pertinent part:

3. Since the 1975 publication of the Department of Transportation’s “Policies and Procedures for Accommodating Utilities on Highway Rights of Way,” utility companies are required to obtain written permission of the Department of Transportation before placing a utility in the right-of-way of any road on the North Carolina State System. Utility companies typically seek this written permission by applying for an encroachment on a standardized form known as an Encroachment Agreement Upon approval of the encroachment by the Department of Transportation, a copy of the Encroachment Agreement is maintained in the appropriate District office and Division office for the particular location where a utility company seeks to install a utility structure.

4. In the event a formal Encroachment Agreement is not utilized by the utility company and the Department of Transportation, the utility company must still obtain written permission to place a utility structure within the right-of-way of any road on the North Carolina State System. This is required pursuant to the Department of Transportation’s “Policies and Procedures for Accommodating Utilities on Highway Rights of Way.” . . . Copies of this written permission would be retained in the appropriate District office and Division office of the Department of Transportation for the particular location where a utility company seeks to install a utility structure.

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5. If a utility line is upgraded, it is not necessary for the utility company to file an Encroachment Agreement. Nevertheless, the Department of Transportation's "Policies and Procedures for Accommodating Utilities on Highway Rights of Way" still requires that written permission be obtained by the Department of Transportation for work done on a utility structure within the right-of-way of any road on the North Carolina State System. This documentation would be retained in the appropriate District office and Division office of the Department of Transportation for the particular location where a utility company seeks to upgrade or perform work on a utility structure.

6. Belmont-Mt. Holly Road in Gaston County, North Carolina, also known as SR-2093, is a roadway on the North Carolina State System

7. Upon a diligent and thorough search of records in the District office and Division office, there is no Encroachment Agreement, other application for encroachment, or documentation on file in the District office or Division office of the Department of Transportation that relates to the placement of utilities in the right-of-way alongside SR-2093 between Interstate 85 and Woodlawn Road in Gaston County, North Carolina. Similarly, upon a diligent and thorough search of records in the District office and Division office there is no documentation that can be found indicating permission given by the Department of Transportation for work to be done, including upgrading, on a utility line owned or operated by [defendant Duke Energy] in the right-of-way alongside SR-2093 between Interstate 85 and Woodlawn Road in Gaston County, North Carolina.

8. The right-of-way encompassing SR-2093 between Interstate 85 and Woodlawn Road is one hundred feet (100') extending for fifty feet (50') on either side of the centerline of SR-2093. There is a utility line running alongside the western edge of SR-2093 between Interstate 85 and Woodlawn Road in Gaston County, which is located within the right-of-way.

Mr. Spangler's affidavit goes on to state that Belmont-Mount Holly Road (SR-2093) in its current configuration was constructed pursuant to design drawing plans dated 2 May 1975 and the road was completed prior to 29 December 1977. The design drawing plans did not indicate the existence of a utility pole in the right-of-way along the

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western edge of Belmont-Mount Holly Road in the vicinity of the subject utility pole.

Plaintiff's complaint also incorporated the affidavit of J. O'Hara Parker, Assistant State Utility Agent for the NC DOT, which states in pertinent part:

6. Upon a diligent and thorough search by myself and a member of the Right-of-Way Department, there is no Encroachment Agreement or other application for encroachment on file in the Right-of-Way office at the [NC DOT] that relates to the placement of utilities by [defendant Duke Energy] in the right-of-way alongside SR-2093 between Interstate 85 and Woodlawn Road in Gaston County, North Carolina.

Plaintiff's complaint also incorporated the affidavit of Ayden Flowers, a former State Utility Agent for the NC DOT, which states in pertinent part:

2. One of the responsibilities of the State Utility Agent is to coordinate the placement of roadside utility structures—such as utility poles—which are to be located inside highway rights-of-way in a manner that accounts for the safety of the traveling public and the protection of the integrity of the roadway facility. In this respect, the State Utility Agent works with utility companies to effectuate, as far as practical, the following “general consideration” as stated in the Department of Transportation’s 1975 publication entitled “Policies and Procedures for Accommodating Utilities on Highway Rights of Way”: 5 The location of the above ground utility facilities should be consistent with clear recovery area for the type of highway

3. The Department of Transportation’s 1975 publication entitled “Policies and Procedures for Accommodating Utilities on Highway Rights of Way” was made available to utility companies, such as Duke Energy Carolinas, LLC, (and its predecessors) which placed utility structures within rights-of-way on roadways which were part of North Carolina Department of Transportation’s roadway system. It was expected that these utility companies would adhere as far as practical to the policies and procedures set forth in this publication.

4. In furtherance of the “general consideration” referenced in paragraph 2, above, one of the policies stated in the 1975 publication was that groundmounted utility facilities, such as utility

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poles, placed along a roadside “should be placed as far as practical from the traveled way and beyond the clear recovery area.” With respect to conventional highways in rural areas, the policy was that “poles and related facilities . . . shall be located at or as near as practical to the right-of-way line. The poles should be located outside the clear recovery area for the highway sections involved”

5. As stated in the 1975 publication, utility companies performing work within a State right-of-way, such as installation of utility poles, are required to obtain an Encroachment Agreement. See Exhibit 4 (“Prior to beginning work within State right-of-way, the utility owner shall obtain an Encroachment Agreement.”). The purpose of such an Encroachment Agreement is for the Department of Transportation to approve the placement of a utility within a State right-of-way. This approval would be based upon considerations contained in the 1975 Department of Transportation publication entitled “Policies and Procedures for Accommodating Utilities on Highway Rights of Way.”

Based upon the various exhibits and affidavits which were incorporated into the complaint, only a few of which are discussed above, plaintiff alleged numerous negligent acts or omissions by defendant Duke Energy, including that defendant Duke Energy

e. Failed to install and/or replace the utility line which included the subject pole, or parts of such utility line, including the pole itself, in a location consistent with applicable North Carolina Department of Transportation regulations and/or guidelines;

k. Failed to secure the proper authorizations required by the North Carolina Department of Transportation for installation and/or modifications of the subject utility pole and/or the utility line of which the subject utility pole is a component[.]

On 25 September 2008, plaintiff filed a complaint against defendant Duke Energy and defendant Walker in Superior Court, Gaston County. On or about 23 October 2008, defendant Duke Energy filed a Motion to Dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. By order issued on 4 December 2008, the trial court granted defendant’s motion, dismissing plaintiff’s suit as to defendant Duke Energy. On 19 December 2008, plaintiff gave notice of appeal. On 22 June 2009, defendant Duke Energy filed a motion with this Court seeking dismissal of plaintiff’s appeal and sanctions including

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attorney's fees, striking portions of plaintiff's brief, and any other sanction the Court deemed proper.

II. Motion for Sanctions

[1] We first address defendant Duke Energy's motion for dismissal of plaintiff's appeal and for sanctions against plaintiff. Defendant Duke Energy argues that portions of plaintiff's brief include "extraneous and prejudicial statements" in the "Statement of Facts" section, which are not found in the record on appeal in violation of Rule 28(b)(5) of the North Carolina Rules of Appellate Procedure. We agree with defendant that portions of plaintiff's statement of the facts in her brief violate N.C.R. App. P. 28(b)(5), in that it includes facts without supporting references to pages in the record on appeal or exhibits. However, "only in the most egregious instances of nonjurisdictional default will dismissal of the appeal be appropriate." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 200, 657 S.E.2d 361, 366 (2008). "[T]he appellate court may not consider sanctions of any sort when a party's noncompliance with nonjurisdictional requirements of the rules does not rise to the level of a 'substantial failure' or 'gross violation'[,]" which is established if the violations would "impair[] the court's task of review" or "frustrate the adversarial process[.]" *Id.* at 199-200, 657 S.E.2d at 366-67. A review of plaintiff's brief shows that these violations did not occur throughout plaintiff's statement of the facts and do not "impair[] the court's task of review" or "frustrate the adversarial process[.]" *See Id.* Therefore, as plaintiff's violations of N.C.R. App. P. 28(b)(5) do not rise to the level of a "substantial failure" or "gross violation" of the rules and the "[r]ules of practice and procedure are devised to promote the ends of justice, not to defeat them[.]" we will review the merits of plaintiff's appeal. *Id.* at 194, 657 S.E.2d at 363. However, we do admonish plaintiff's counsel to include appropriate references to the record or exhibits in accordance with N.C.R. App. P. 28(b)(5) in the future.

III. Rule 12(b)(6) Dismissal

[2] Plaintiff raises as her only assignment of error the issue of whether

the trial court err[ed] by failing to recognize that the Legislature has superseded *Wood v. Carolina Telephone & Telegraph* (228 N.C. 605, 46 S.E.2d 717 (1948)) as controlling legal authority through its grant of power to the N.C. Department of Transportation pursuant to N.C.G.S. § 136-18(10) to regulate the

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installation and maintenance of utility poles alongside roadways, where such regulations establish a standard of care designed to protect the traveling public[.]

Defendant Duke Energy argues that the allegations in plaintiff's complaint, "taken as true, attempt to allege a negligence / negligence *per se* claim against Duke Energy that has specifically and consistently been adjudged defective and rejected as a matter of law by both this Court and the North Carolina Supreme Court in numerous cases over the last sixty (60) years." Therefore, "[t]his court is bound by that controlling legal precedent and should dismiss [plaintiff's] action . . . with prejudice"

A. Standard of Review

This case is before the Court on an appeal of an order dismissing plaintiff's complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6).

On a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, the standard of review is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. The complaint must be liberally construed, and the court should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief.

Nucor Corp. v. Prudential Equity Group, LLC, 189 N.C. App. 731, 735, 659 S.E.2d 483, 486 (2008) (citation and quotation marks omitted). The complaint in this case is somewhat unusual as it incorporated several affidavits, accident reports, and other information. Because of this additional information beyond the usual allegations of a complaint, especially the affidavits, our decision in this case may appear much like a ruling on a motion for summary judgment, but it is not. Also, we note that because the matter is before us on a motion to dismiss, defendant Duke Energy has not provided any affidavits or other information opposing the complaint's allegations, as would normally occur in a summary judgment context. We must therefore consider all of the allegations of the plaintiff's complaint, including the affidavits and various attachments, as true, and we must liberally construe all of these facts as alleged by plaintiff. *See id.*

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B. Negligence *Per Se*1. NC DOT regulations applicable to the subject utility pole.

Plaintiff first contends that based upon applicable NC DOT regulations and the facts alleged in her complaint, she has sufficiently pled a claim for negligence *per se*. Plaintiff argues that NC DOT regulations establish the applicable standard of care, superceding *Wood v. Carolina Telephone & Telegraph Co.*, 228 N.C. 605, 46 S.E.2d 717 (1948) and other cases following *Wood* which are relied upon by defendant Duke Energy. Plaintiff argues these NC DOT regulations carry the force and effect of law and give rise to a cause of action for violation, so defendant's failure to obtain the necessary authorizations, as required by NC DOT regulations, for placement of the subject utility pole struck by defendant Walker constitutes negligence *per se*.

Defendant Duke Energy contends that the allegations in plaintiff's complaint "do not establish that the cited NC DOT regulations apply to control Duke Energy's conduct with respect to the installation of the overhead electrical line at issue . . . because there is no allegation that the electrical line was installed after the effective dates of those regulations." Thus, defendant Duke Energy's first argument is that the regulations as alleged by plaintiff do not apply to the subject utility pole.

Plaintiff has made allegations that several different guidelines or regulations apply to the subject utility pole. The first, adopted in 1975, is the Department of Transportation's "Policies and Procedures for Accommodating Utilities on Highway Rights of Way" ("the 1975 NC DOT manual"). Plaintiff's complaint alleges that the relevant provisions of the 1975 NC DOT manual are "applicable to Belmont-Mt. Holly Road." Plaintiff also alleged that "[u]pon information and belief the utility line which contains the subject utility pole was installed subsequent to 1977." Plaintiff alleges that the subject utility pole was in violation of Chapter 19A, Section 02B.0502 of the North Carolina Administrative Code, titled "Permission Required for Encroachment," with an effective date of 3 April 1981. Defendant argues that since plaintiff has alleged that the utility line including the subject utility pole was installed "sometime" after 1977, plaintiff has failed to establish that "the cited regulations apply to or govern the installation of the electrical line at issue, including the subject utility pole, and they do not establish a standard of care, the violation of which amounts to negligence *per se*." However, plaintiff has also alleged that the subject utility pole was impacted in 1997, 2001, and 2003, sustaining

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damage which required replacement of the pole. Plaintiff also alleged that “upon information and belief the subject utility pole had been installed subsequent to 1999.”

On a motion to dismiss, we are required to liberally construe the allegations of the complaint and to treat them as true. *See Nucor Corp.*, 189 N.C. App. at 735, 659 S.E.2d at 486. By application of this standard, the complaint alleges that the subject utility pole was installed after 1999 and was therefore governed by all of the statutes, guidelines, and regulations alleged by plaintiff. As we must accept the allegations of the complaint as true, defendant Duke Energy’s argument as to the applicable dates of the regulations fails. For purposes of the motion to dismiss, we must therefore consider all of the NC DOT guidelines and regulations alleged by plaintiff as applicable to the subject utility pole’s installation and maintenance.

2. NC DOT regulations establish the duty of care.

Plaintiff argues that the NC DOT regulations and guidelines incorporated into her complaint establish defendant Duke Energy’s duty of care, and violation of those regulations and guidelines is negligence *per se*. A public safety statute can impose a specific duty on a defendant for the protection of others. *Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 326, 626 S.E.2d 263, 266 (2006). Violation of the public safety statute constitutes breach of that duty or negligence *per se*. *Id.* “The basis of the rule seems to be that the statute prescribes the standard of care, and the standard fixed by the Legislature is absolute.” *Byers v. Std. Concrete Prods. Co.*, 268 N.C. 518, 521, 151 S.E.2d 38, 40 (1966) (citation omitted). However, “not every statute [or regulation] purporting to have generalized safety implications may be interpreted to automatically result in tort liability for its violation.” *Williams v. City of Durham*, 123 N.C. App. 595, 598, 473 S.E.2d 665, 667 (1996) (citation and quotation marks omitted). For a safety regulation to be adopted as a standard of care, the purpose of the regulation must be at least in part:

- (a) to protect a class of persons which includes the one whose interest is invaded, and
- (b) to protect the particular interest which is invaded, and
- (c) to protect that interest against the kind of harm which has resulted, and
- (d) to protect that interest against the particular hazard from which the harm results.

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Hutchens v. Hankins, 63 N.C. App. 1, 14, 303 S.E.2d 584, 592, *disc. review denied*, 309 N.C. 191, 305 S.E.2d 734 (1983) (citation and quotation marks omitted). An agency is prohibited from imposing criminal liability or civil penalty for violation of a safety regulation “unless a law specifically authorizes the agency to do so or a law declares that violation of the rule is a criminal offense or is grounds for a civil penalty.” N.C. Gen. Stat. § 150B-19(3)(2005). Therefore, if the violation of a safety regulation is punishable as a criminal offense, the violation may establish negligence *per se* in a civil trial in certain circumstances.

Our Supreme Court most recently addressed a situation in which a plaintiff was injured by an “errant vehicle” which collided with a utility structure within highway a right-of-way in *Baldwin v. GTE S., Inc.*, 335 N.C. 544, 439 S.E.2d 108 (1994). In *Baldwin*, plaintiff was injured when a dump truck struck the telephone booth in which she was making a phone call. *Id.* at 545, 439 S.E.2d at 108. The telephone booth was located inside the public right-of-way and owned by defendant GTE South. *Id.* The Court observed that pursuant to the enabling authority of N.C. Gen. Stat. § 136-18(10), NC DOT has power

[t]o make proper and reasonable rules, regulations and ordinances for the placing or erection of telephone, telegraph, electric and other lines, above or below ground, signboards, fences, . . . pipelines, and other similar obstructions that may, in the opinion of [NC DOT], contribute to the hazard upon any of the said highways or in any way interfere with the same, and to make reasonable rules and regulations for the proper control thereof.

Id. at 546, 439 S.E.2d at 109 (quoting N.C. Gen. Stat. § 136-18(10)). Also, the Court noted that “[a]ny violation of such rules and regulations . . . shall constitute a misdemeanor.” *Id.* The Court also stated that pursuant to N.C. Gen. Stat. § 136-18(10), NC DOT enacted a regulation prohibiting the placement of telephone booths within rights-of-way, except in rest areas or truck weigh stations, in NC DOT’s manual titled, “Policies and Procedures for Accommodating Utilities on Highway Rights of Way.” *Id.* The Court found that “[d]efendant, which was legally obligated to follow the regulation, violated this prohibition when it installed the . . . telephone booth within the public right-of-way.” *Id.* The Court then held that

[w]hen the violation of an administrative regulation enacted for safety purposes is criminal [such as N.C. Gen. Stat. § 136-18(10)], that violation is negligence *per se* in a civil trial unless otherwise provided. A safety statute or a safety regulation having the force and

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effect of a statute creates a specific duty for the protection of others. A member of the class intended to be protected by a statute or regulation who suffers harm proximately caused by its violation has a claim against the violator. To determine whether a plaintiff is a member of the class protected by the regulation, we must examine [the regulation's] purpose

Id. at 546-47, 439 S.E.2d at 109 (citations omitted). The Court found that since “the purpose of this regulation was to protect the safety of the motorist who might leave the road and strike the booth while simultaneously protecting the pedestrian who might be using the booth” and, as plaintiff was a pedestrian using the booth, she was a member of the class the regulation was intended to protect. *Id.* at 548, 439 S.E.2d at 110.

Baldwin establishes that NC DOT regulations regarding the placement of telephone booths in the right-of-way in the 1975 NC DOT manual, adopted pursuant to N.C. Gen. Stat. § 136-18, establish a standard of care for a defendant utility company. *See id.* Similarly, plaintiff here contends that NC DOT regulations in the same 1975 NC DOT manual, along with additional NC DOT regulations and guidelines regarding placement of utility poles in the rights-of-way of roads and highways within North Carolina, also establish a standard of care for defendant Duke Energy. The 1975 NC DOT manual provides that

Longitudinal installations should be located on uniform alignment, preferably near the right-of-way lines as determined satisfactory by the Manager of Right-of-Way or Division Engineer so as to provide a safe environment for traffic operation The location of the above ground utility facilities [such as utility poles] should be consistent with clear recovery area for the type of highway involved, so as to provide drivers of errant vehicles which leave the traveled portion of the roadway a reasonable opportunity to stop safely or otherwise regain control of the vehicle Poles and related facilities on and along conventional highways in rural areas *shall be located at or as near as practical to the right-of-way line*. The poles should be located outside the clear recovery area for the highway sections involved

The 1975 NC DOT manual defines “Clear Recovery Area” as

[t]hat portion of the roadside, adjacent to the traveled way and shoulders, having slopes safely traversable by vehicles and which has been designated as the area to be kept as free as practical

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from those above-ground physical obstructions that would be a hazard. The width of an area varies according to the type of highway involved and may vary on different sections of the same type of highway.

The 1975 NC DOT manual goes on to state regarding placement of power and communication lines that

[a] critical requirement for locating poles . . . along the roadside is the width of the border area, that is, the space between the back of [the] ditch or curb line and the right-of-way line, and its availability and suitability for accommodating such facilities. The safety, maintenance efficiency, and appearance of highways are enhanced by keeping this space as free as practical from obstacles above the ground. Where ground-mounted utility facilities are to occupy this space, they should be placed as far as practical from the traveled way and beyond the clear recovery area

Plaintiff also contends that pursuant to N.C. Gen. Stat. § 136-18(10), NC DOT in 1978 promulgated Chapter 19A, Section 02E.0420 of the North Carolina Administrative Code, titled “Construction Within Right-of-Way,” which states

[i]t shall be unlawful for any person or firm to construct, place or erect any power, telephone or other poles . . . in, over, or upon any road, highway or right of way of the State Highway System without the written permission of the State Highway Administrator or his authorized agent.

19A N.C. Admin. Code 02E.0420 (2005) (effective 1 July 1978). Also, plaintiff contends that pursuant to N.C. Gen. Stat. § 136-18(10) (2005), NC DOT promulgated Chapter 19A, Section 02B.0502 of the North Carolina Administrative Code, titled “Permission Required for Encroachment”, which states

(a) No utility shall cross or otherwise occupy rights-of-way of any road on the State Highway System without written permission from the Department of Transportation.

(b) No utility which has been placed on the right-of-way of any road on the State Highway System shall be changed or removed without written permission from the Department of Transportation.

19A N.C. Admin. Code 02B.0502 (2005)(effective 3 April 1981).

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Based upon *Baldwin* and *Hutchens*, we must first examine the purpose of the regulations to determine if these NC DOT regulations establish a standard of care applicable to defendant Duke Energy. See *Hutchens*, 63 N.C. App. at 14, 303 S.E.2d at 592. The 1975 NC DOT manual states that the reason for the regulations relevant to plaintiff's claim is "to provide a safe environment for traffic operation" by limiting or prohibiting obstacles in the right-of-way and providing for a "clear recovery area" for the type of highway involved, so that "drivers of errant vehicles which leave the traveled portion of the roadway [may have] a reasonable opportunity to stop safely or otherwise regain control of the vehicle." Although the word "purpose" is not used, the purpose of the regulation is clearly "to provide a safe environment for traffic operation" which includes protection of "drivers of errant vehicles which leave the traveled portion of the roadway." Even though 19A N.C. Admin. Code 02E.0420 and 19A N.C. Admin. Code 02B.0502 do not state an express purpose, our Courts have recognized implied purposes in determining whether a plaintiff was a member of the class the regulation was intended to protect for negligence *per se*. See *Baldwin*, 335 N.C. at 547-48, 439 S.E.2d at 110; *Byers*, 268 N.C. at 521-22, 151 S.E.2d at 40-41. When read in conjunction with the 1975 NC DOT manual, 19A N.C. Admin. Code 02E.0420 and 19A N.C. Admin. Code 02B.0502 furthers the 1975 NC DOT manual's purpose of providing a safe environment for motorists by requiring written permission from NC DOT before placement of or modification to those utilities in the right-of-way so NC DOT can evaluate the effect of that proposed utility structure upon the safety of the traveling public. Therefore, the implied purpose of these NC DOT regulations is also to provide a safer environment for motorists, including "errant vehicles" which leave the paved roadway.

As we have determined that the purpose of the NC DOT regulations is to provide a safer environment for motorists, including those in "errant vehicles" which leave the paved roadway, under *Hutchens* we must next consider if the regulations are intended "to protect a class of persons which includes the" plaintiff.³ 63 N.C. App. at 14, 303

3. We note that the *Baldwin* court specifically rejected the holding of the Court of Appeals that the plaintiff in that case was not a member of a protected class under the *Hutchens* analysis. 335 N.C. at 548, 439 S.E.2d at 110. The Court of Appeals held that "the DOT prohibition against telephone booths in or upon highway rights-of-way does not include pedestrians within the class of protected persons. While the DOT's regulation may have safety implications, it does not provide a basis for negligence claims by this plaintiff." *Baldwin v. GTE S.*, 110 N.C. App. 54, 59, 428 S.E.2d 857, 860 (1993) (citation omitted).

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S.E.2d at 592. The regulations state that their interest is for motorist safety on the highways and plaintiff's specific interest which was invaded was her safety as a passenger in a automobile traveling on the public highways. The regulations are intended to protect "errant vehicles" "which leave the traveled portion of the roadway" from colliding with utility structures located in the right-of-way to an extent which is to be determined by the NC DOT in accordance with the requirements of a "clear recovery area[;]" plaintiff was a passenger in an "errant vehicle" which left "the traveled portion of the roadway" and collided with a utility structure, in this case the subject utility pole, located in the public right-of-way. Plaintiff is clearly within the class of persons which the regulations are intended to protect.

Likewise, the regulations were intended "to protect the particular interest which is invaded" and "to protect that interest against the kind of harm which has resulted." See *Hutchens*, 63 N.C. App. at 14, 303 S.E.2d at 592. The regulations protect plaintiff's specific interest as they promote highway safety by requiring a "clear recovery zone" in the public right-of-way for motorists to stop or recover control if they leave the roadway, by NC DOT regulation of the placement of utility structures in the public right-of-way. Plaintiff has alleged that she was injured because the car in which she was a passenger hit the subject utility pole, for which defendant Duke Energy had not obtained NC DOT approval in accordance with the applicable safety regulations. In addition, the regulations are specifically intended to "to protect [plaintiff's] interest against the particular hazard from which the harm results." *Hutchens*, 63 N.C. App. at 14, 303 S.E.2d at 592. Also, a violation of these safety regulations enacted pursuant to N.C. Gen. Stat. § 136-18(10) for safety purposes is a Class 1 misdemeanor. See N.C. Gen. Stat. § 150B-19(3). Given that the purposes of these regulations satisfy the enumerated requirements of *Hutchens*, 63 N.C. App. at 14, 303 S.E.2d at 592, plaintiff has sufficiently alleged these regulations as the standard of care for defendant Duke Energy. Accordingly, violation of these regulations could be the basis for a claim of negligence *per se*. See *Baldwin*, 335 N.C. at 546, 439 S.E.2d at 109-10.

3. Breach of defendant's duty of care.

We have established that the NC DOT regulations are applicable to the subject utility pole and that a violation of these regulations may be the basis of a claim of negligence *per se*. Plaintiff has alleged that defendant Duke Energy failed to obtain from NC DOT a permit or encroachment agreement as required by law and that the pole was

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located and maintained in violation of the applicable regulations. Accepting the allegations of plaintiff's complaint as true, *Nucor Corp.*, 189 N.C. App. at 735, 659 S.E.2d at 486, defendant Duke Energy has breached its duty to comply with the regulations. Therefore, plaintiff has pled a breach of defendant Duke Energy's duty of care.

4. Proximate causation.

A claim of negligence *per se* or ordinary negligence must also demonstrate that the statutory violation was "a proximate cause of [plaintiff's] injury[.]" *Hart v. Ivey*, 332 N.C. 299, 303, 420 S.E.2d 174, 177-78 (1992) (citation omitted). *See Sellers v. CSX Transp., Inc.*, 102 N.C. App. 563, 566, 402 S.E.2d 872, 874 (1999) ("Violation of a duty imposed by a safety statute is negligence *per se* and conclusive evidence of both the presence of a duty and a breach of it. However, recovery still requires proof of proximate cause." (citation omitted)).

It is well settled in this jurisdiction that the violation of a town or city ordinance, or State statute, is negligence *per se*, but the violation must be the proximate cause of the injury. Ordinarily this is a question for the jury, if there is any evidence, but, if there is no evidence that the violation of the ordinance or statute is the proximate cause of the injury, this is for the court to determine.

Hendrix v. Southern R. Co., 198 N.C. 142, 144, 150 S.E. 873, 873 (1930).

Plaintiff argues that the trial court incorrectly relied upon *Wood v. Carolina Telephone & Telegraph*, 228 N.C. 605, 46 S.E.2d 717 (1948) in holding that defendant's placement of the subject utility pole was not a proximate cause of plaintiff's injuries because plaintiff's injuries were not a foreseeable consequence of defendant's actions. Plaintiff further contends that *Wood* and cases following *Wood* concerning the foreseeability that a vehicle may leave the traveled roadway have been superseded by the General Assembly's subsequent enactment of specific regulations governing the installation and maintenance of utility poles, with a purpose of protecting "errant vehicles." Defendant Duke Energy argues that its alleged negligence *per se* in placement of the subject utility pole, even if "taken as true, is not and cannot be the proximate cause of [plaintiff's] alleged injuries" because established case law holds that utility companies are not required to foresee the negligent act of a motorist leaving the intended path of travel and coming into contact with a utility pole, and the negligent acts of the defendant Walker, the driver, are an intervening cause of plaintiff's injuries.

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Defining the limits of proximate causation is frequently a challenging task for our courts, especially in cases which involve two acts of negligence which may have led to the plaintiff's injuries.

Proximate cause has been defined as a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and *without which the injuries would not have occurred*, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed.

Lynn v. Overlook Dev., 328 N.C. 689, 696, 403 S.E.2d 469, 473 (1991) (citation and quotation marks omitted) (emphasis in original). Our Supreme Court has also noted that:

[a]n efficient intervening cause is a new proximate cause which breaks the connection with the original cause and becomes itself solely responsible for the result in question. It must be an independent force, entirely superseding the original action and rendering its effect in the causation remote. It is immaterial how many new elements or forces have been introduced, if the original cause remains active, the liability for its result is not shifted

Hairston v. Alexander Tank & Equipment Co., 310 N.C. 227, 236, 311 S.E.2d 559, 566-67 (1984) (citation and quotation marks omitted). We must apply these general statements of the law of proximate causation in the context of the facts alleged by plaintiff and the cases preceding this one which have also addressed these issues in similar factual situations. Our Supreme Court has stated that:

Definitions and general statements made with reference to specific situations are of little help in those cases in which the defendant's negligence is followed, not by reasonably foreseeable consequences but by events which, *prima facie*, he could not have anticipated. Prosser, in his *Law of Torts* § 50 (3d Ed. 1964) at p. 288, says: " 'Proximate cause' cannot be reduced to absolute rules. No better statement ever has been made concerning the problem than that of Street: 'It is always to be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy and precedent. . . .'" The policy argument over whether the loss should be borne by an innocent plaintiff or a defendant whose negligence caused harmful events not reasonably foreseeable will continue. However, since it is "inconceivable that any defendant should be

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held liable to infinity for all the consequences which flow from his act,” some boundary must be set. *Id.* at p. 303. The concept of the foreseeable risk, especially in cases involving an intervening cause, seems to offer the most elastic and practical solution. *See* Prosser at pp. 306, 310-11. *See also* Morris, 34 Minn. L. Rev. 185 (1950).

Sutton v. Duke, 277 N.C. 94, 108, 176 S.E.2d 161, 169 (1970).

We therefore turn first to examine the precedents set by our courts. The North Carolina Supreme Court’s prior cases addressing the proximate causation and foreseeability of injury in cases dealing with errant vehicles which collide with a structure in the right-of-way may appear to be inconsistent. On one hand, defendant Duke Energy argues correctly that since *Wood*, as a general rule, a plaintiff may not recover from a utility company which maintains a structure in the right-of-way for injuries sustained from collision with the structure by a motor vehicle which has run off of the roadway. *See Wood*, 228 N.C. at 607-08, 46 S.E.2d at 719. On the other hand, plaintiff argues correctly that our Supreme Court in *Baldwin* affirmed the plaintiff’s recovery in exactly this situation, and, even though proximate causation was not directly addressed, *Baldwin* would suggest that defendant Duke Energy should have reasonably foreseen the risk of injury caused by the subject utility pole based upon the NC DOT regulations which address this very risk. *See Baldwin*, 335 N.C. at 546, 439 S.E.2d at 109.

The 1975 NC DOT manual “Policies and Procedures for Accommodating Utilities on Highway Rights of Way” states that “[t]he location of the above ground utility facilities should be consistent with clear recovery area for the type of highway involved, *so as to provide drivers of errant vehicles which leave the traveled portion of the roadway reasonable opportunity to stop safely or otherwise regain control of the vehicle.*” (emphasis added). Plaintiff’s complaint also includes the affidavit of Ayden Flowers, the former State Utility Agent for the NC DOT, which states in pertinent part: “[U]tility poles . . . are to be located inside highway rights-of-way in a manner that accounts for the safety of the traveling public and the protection of the integrity of the roadway facility.” Ms. Flowers also states that the State Utility Agent works with utility companies to effectuate, as far as practical, the following “general consideration” as stated in the 1975 NC DOT manual “Policies and Procedures for Accommodating Utilities on Highway Rights of Way[:]”

The location of the above ground utility facilities should be consistent with clear recovery area for the type of highway involved,

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so as to provide drivers of errant vehicles which leave the traveled portion of the roadway a reasonable opportunity to stop safely or otherwise regain control of the vehicle. . . .

As noted above, it is clear from the language of the 1975 NC DOT manual that one of the primary purposes of the regulations is to account for drivers errantly leaving the traveled portion of the roadway and to provide for a safe area for those drivers to stop or recover safely. Plaintiff alleged that defendant Duke Energy knew or should have known about these regulations, although regardless of whether or not defendant Duke Energy knew about the regulations, it was bound by them. Plaintiff also included with her complaint accident reports showing that between 1997 and 2003 at least three motorists ran off the traveled roadway and hit the subject utility pole or predecessor poles in the same location. Therefore, plaintiff argues that in the exercise of reasonable care defendant Duke Energy should have foreseen the risk of injury to a motorist because of its placement of the subject utility pole in violation of NC DOT regulations.

Baldwin is the only North Carolina case cited by the parties or that we have been able to locate in our own research which finds the owner of a utility structure located in a highway right-of-way liable for injury to a person injured because a motor vehicle left the roadway and hit the utility structure. *See Baldwin*, 335 N.C. at 547-48, 439 S.E.2d at 109-10. All other cases addressing this factual situation have held that the owner of the utility structure is not liable, either based upon a lack of proximate causation or by intervening proximate cause. In addition to citing *Wood*, defendant Duke Energy also cites to *Alford v. Washington*, 238 N.C. 694, 78 S.E.2d 915 (1953) and *Shapiro v. Toyota Motor Co.*, 38 N.C. App. 658, 248 S.E.2d 868 (1978), in support of its argument that utility companies are not required to foresee or protect against collisions between negligently operated motor vehicles and utility poles located off the roadway. Defendant concludes that as plaintiff alleges that the utility pole at issue was located 12.5 feet off the roadway and would not have caused plaintiff's injuries had defendant Walker had stayed within the intended path of travel for the road, defendant's alleged negligent acts of improperly locating, installing, and maintaining the pole, even if true, are not and cannot be a proximate cause of plaintiff's damages as a matter of law. Essentially, defendant Duke Energy argues that defendant Walker's negligence in running off of the roadway was the intervening proximate cause of plaintiff's injuries.

In *Wood v. Carolina Telephone & Telegraph Co.*, 228 N.C. 605, 46 S.E.2d 717 (1948), the plaintiff's car blew out its left rear tire causing

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the car to skid to the left. The plaintiff then inadvertently placed his right foot on the accelerator instead of the brake, causing the car to increase in speed and skid farther across the road to the left. *Id.* at 606, 46 S.E.2d at 718. The momentum of the car pulled the plaintiff's left arm out of the open driver's side window and it hit a telephone pole, located six inches outside the traveled portion of the street, causing injuries to the plaintiff's arm. *Id.* at 606, 46 S.E.2d at 717-18. The defendant maintained the telephone pole as part of its communications system. *Id.* at 606, 46 S.E.2d at 717. The plaintiff alleged "that the manner of maintenance of said pole constituted a hazard and menace to persons traveling on the street and was in violation of a pleaded town ordinance and constitutes negligence which proximately caused his injury." *Id.* at 606, 46 S.E.2d at 718. The *Wood* Court recognized the allegation that the location of pole which injured the plaintiff's arm may have been in violation of the town ordinance and thereby negligent as follows:

it is debatable whether the maintenance of defendant's telephone pole at the point alleged is in violation of the pleaded town ordinance. It is not alleged that no license has issued as required by the ordinance. Furthermore, it may be that the ordinance has been superseded and rendered void by subsequent legislative acts. G. S. 105-120 (5); G. S. 136-18 (j)[.]

Id. at 607, 46 S.E.2d at 718. However, the Court declined to rule on this basis, stating, "This we need not now decide, for, even if we concede negligence on the part of the defendant as alleged by plaintiff, there is no allegation in the complaint which reasonably imports injury to plaintiff as a proximate result thereof." *Id.* at 607, 46 S.E.2d at 719. Instead, the Court affirmed the trial court's dismissal, holding that the defendant's actions were not the proximate cause of the plaintiff's injuries because the "defendant, in the exercise of due care and foresight, could [not] have foreseen or anticipated that a motorist traveling along the street would, voluntarily or involuntarily, place his arm out of the window of his vehicle to such an extent that it would come in violent contact [with the pole]." *Id.* at 608, 46 S.E.2d at 719. The Court further held that the defendant did not have a duty to foresee "the unusual, extraordinary, or exceptional[;]" "[t]he occurrence detailed by plaintiff in his complaint was beyond the realm of probability[;]" and the plaintiff's action whether inadvertence, mishap, or act of negligence "was the intervening proximate cause of his injury." *Id.* (citation omitted). The Court's decision relied entirely upon foreseeability considerations and "intervening proximate cause" of the injury based on the plaintiff's

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actions. *Id.* at 607-08, 46 S.E.2d at 719. The Court also did not deem it necessary to determine that the plaintiff was himself contributorily negligent in causing the accident, stating that

It is unnecessary to undertake to label plaintiff's own conduct Whether his acceleration of the speed of the car at the time and under the attendant circumstances was a mere inadvertence, a mishap, or an act of negligence, the fact remains that such conduct on his part was the intervening proximate cause of his injury.

Id. at 608, 46 S.E.2d at 719 (citation omitted).

In *Shapiro*, the plaintiff was injured when the car in which he was riding as a passenger collided with a telephone pole located beside the road, on the night of 19 September 1973. 38 N.C. App. at 659, 248 S.E.2d 868-69. The plaintiff brought a claim against the defendant telephone company, which erected and maintained the telephone pole.⁴ *Id.* at 659, 248 S.E.2d at 869. The plaintiff accused the defendant telephone company of "negligent placement of said telephone pole on a dangerous curve, after knowledge of numerous prior accidents involving other vehicles and other poles located in virtually the same exact location." *Id.* In response to interrogatories, the defendant telephone company "produced a Rural Electrification Administration Telephone Engineering and Construction Manual which requires a clearance of only six inches (6") between a curb and telephone pole, subject to local requirements if more stringent." *Id.* at 660, 248 S.E.2d at 869. In response to a similar interrogatory, the defendant power company produced "State Department of Transportation Policies and Procedures[.]" which provided that "[t]here is no single minimum dimension for setback of poles behind curbs; however, where there are curbed sections and no sidewalks, 6' will be used as a design safety concept guide." *Id.* The defendant telephone company "moved for summary judgment; in support it submitted the 1951 ordinance under which the town authorized erection of telephone poles and an affidavit showing that this pole was located twelve and one-half inches (12 1/2") beyond the curb[.]" *Id.* The plaintiff also filed three affidavits.

4. The plaintiff in *Shapiro* also brought negligence claims against Toyota Motor Co. and the Town of Matthews, but those claims were unrelated to the location and maintenance of the telephone pole. 38 N.C. App. at 659, 248 S.E.2d at 868-69. The plaintiff dismissed his claim against Duke Power Co., which maintained a light on the telephone pole, prior to the appeal. *Id.*

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One was from a photographer identifying the photographs of [the road in question]. An affidavit from engineer Rolf Roley, an expert in automobile accidents, tended to show that the intersection “was inherently dangerous and extremely hazardous in that it had been constructed as an angle,” that there were inadequate warnings leading up to the intersection and inadequate lane markings in the intersection, that there was no reason for placing this telephone pole at its existing location, that if Roley “were called upon to place a pole at a point most likely to be involved with vehicular problems and impacts, I would select the exact spot where this pole is placed,” and that the Toyota involved in this accident would have missed nearby trees and “would have done nothing more than run into the yard . . . if the pole had not been at that location.” Finally plaintiffs presented, by way of an affidavit from one of their attorneys, Department of Motor Vehicles records showing seven accidents at this intersection since 1967, four of which involved telephone poles at this same location, and a newspaper story referring to this intersection as “dead man’s curve.”

Id. at 660-61, 248 S.E.2d at 869-70. The trial court granted summary judgment for defendant. *Id.* at 661, 248 S.E.2d at 870. This Court, referencing the decision in *Wood*, held that “the maintenance of a utility pole along a public highway does not constitute an act of negligence unless the pole constitutes a hazard to motorists using the portion of the highway designated and intended for vehicular travel in a proper manner.” *Id.* at 663, 248 S.E.2d at 871. Applying this rule, this Court affirmed summary judgment as the car the plaintiff was riding in

failed to negotiate the curve and crashed into the telephone pole located twelve and one-half inches (12 1/2") beyond the elevated curbing forming the southern edge of the outside eastbound lane of travel for vehicles approaching downtown Matthews from the west. Obviously, the pole would not have been struck had the Toyota been operated in a proper manner. Thus, the maintenance of the pole did not constitute an act of negligence.

Id. at 663-64, 248 S.E.2d at 871. Although the Court stated that “the maintenance of the pole” in its particular location “did not constitute an *act of negligence*[,]” this statement appears to conflate the concepts of negligence and proximate cause and perhaps misstates the opinion’s actual holding. As *Shapiro* is based upon *Wood*, the Court might have more aptly stated its conclusion as follows: “[E]ven if we concede negligence on the part of the defendant” as to “the maintenance of the

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pole[.]” “there is no allegation in the complaint which reasonably imports injury to plaintiff as a proximate result thereof[.]” because the negligence of the plaintiff’s driver “was the intervening proximate cause of [the plaintiff’s] injury.” *Wood*, 228 N.C. at 607-08, 46 S.E.2d at 719.

In *Alford*, the plaintiff alleged that the defendant town maintained a street light in an intersection 15 feet above the surface of the road, by means of a supporting wire attached to two poles, with high voltage wires for current. 238 N.C. at 695, 78 S.E.2d at 916. These poles were located within a few inches of the curb on either side of the road. *Id.* The defendant driver, while intoxicated and speeding, failed to yield as he entered the intersection and his vehicle hit a third vehicle, causing it to knock down one or more of the supporting poles of the street light resulting in exposed electrical wires falling onto that third vehicle, charging it with electrical current. *Id.* at 697, 78 S.E.2d at 917. The plaintiff’s intestate was killed by high voltage current as he sought to rescue the passengers caught in the third vehicle. *Id.* The plaintiff alleged that the poles were located negligently within a few inches of the traveled portion of the street. *Id.* at 696, 78 S.E.2d at 916. The defendant town and the defendant driver moved for dismissal on the grounds that the plaintiff pled insufficient facts to show negligence or proximate causation and contributory negligence by plaintiff. *Id.* at 697-98, 78 S.E.2d at 918. The trial court granted the defendants’ motions.

Id. at 698, 78 S.E.2d at 918.

The Court, in affirming the trial court’s order dismissing plaintiff’s claim, held that “it appears upon the face of the complaint that the injury to and death of plaintiff’s intestate was ‘independently and proximately produced by the wrongful act, neglect, or default of an outside agency or responsible third person.’” *Id.* citation and quotation marks omitted). The trial court went on to hold that “[o]ne is not under a duty of anticipating negligence on the part of others, but in the absence of anything which gives or should give notice to the contrary, a person is entitled to assume, and to act upon the assumption that others will exercise care for their own safety.” *Id.* at 700, 78 S.E.2d at 919 (citation omitted). Thus, *Wood* and the other cases relied on by defendant have held that even if the utility company was negligent in its location of the pole, the pole would have produced no damage to the plaintiff if either the plaintiff or a responsible third party had not caused a vehicle to leave the traveled roadway and hit the pole.

We are therefore left with the dilemma of reconciling *Baldwin* with *Wood* and the line of cases following *Wood*, as the *Baldwin*

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Court did not overrule *Wood*. As stated above, the *Baldwin* Court held that the same 1975 NC DOT manual which applies in this case establishes a standard of care for a defendant utility company. 335 N.C. at 548, 439 S.E.2d at 110. In addition, *Baldwin* extended this duty to protect a person who was in the right-of-way, but not in the traveled roadway, who was injured by an “errant vehicle” which ran off of the roadway due to the negligent act of a third party.⁵ *Id.* Based upon the NC DOT manual, which includes regulations intended to protect motorists in “errant vehicles,” and *Baldwin*, we cannot say that the mere fact that a vehicle drove outside the travel lane is “beyond the realm of probability[,]” “unusual, extraordinary, or exceptional.” *Wood*, 228 N.C. at 607, 46 S.E.2d at 719.

However, *Baldwin* and *Wood* and its progeny may be distinguished by the fact that the utility poles as in *Wood*, *Shapiro*, and *Alford* were permitted within the right of way, albeit subject to certain restrictions, while the telephone booth in *Baldwin* was in an area where it was entirely prohibited. See *Baldwin*, 335 N.C. at 546, 439 S.E.2d at 109. It is both legal and necessary for utility poles to be located within rights-of-way of roads and highways. As noted in *Wood*,

In almost every hamlet, town and city in the State the space between the sidewalk proper and the street is used for the location and maintenance of telephone and telegraph poles, traffic signs, fire hydrants, water meters, and similar structures. It is a matter of common knowledge that this space is so used. In no sense do such structures constitute a hazard to or in any wise impede the free use of the vehicular lane of travel.

228 N.C. at 607, 46 S.E.2d at 718. (Citations omitted). The NC DOT regulations alleged by plaintiff govern the locations of utility poles but recognize that it is necessary for utility poles and other similar structures to be within the right-of-way. There is no apparent reason or necessity for a telephone booth to be located within a right-of-way of a public roadway. Although the *Baldwin* court did not explain how it distinguished the situation of a telephone booth within the right-of-way from the precedents dealing with utility poles within the right-of-way, we believe that *Baldwin* and *Wood* can be logically reconciled in this manner. In these cases, it is necessary to balance the needs of the public to affordable utility services against the need to provide those services in a reasonably safe manner. Certain utility structures are

5. We note that *Baldwin* does not cite, distinguish, or even mention *Wood*, despite the fact that the parties did address *Wood* in their briefs in that case.

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necessary within the public rights-of-way for provision of electric, telephone, and other services, while telephone booths are a convenience which can just as easily be located on property which is not within a right-of-way.

As applied to the case before us, this distinction points out the deficiency in the plaintiff's complaint. In *Baldwin*, the plaintiff had to show only that the telephone booth was located within the right-of-way to demonstrate violation of the safety regulation. 335 N.C. at 546, 439 S.E.2d at 109. There was no place within the right-of-way in the vicinity of the accident where a telephone booth would be allowed under any circumstances; no matter where the errant driver ran off the road and hit the booth, the booth should not have been located in that spot. *See id.* Here, plaintiff does not claim that defendant violated the applicable regulations merely by placing or maintaining the subject pole in the right-of-way; the plaintiff claims that the negligence *per se* arises from defendant Duke Energy's failure to install and/or replace the subject utility pole in a location consistent with NC DOT regulations and guidelines and its failure to obtain approval from NC DOT to place the subject pole in a particular location. Unlike the determination of whether the phone booth in *Baldwin* was in violation of the safety regulation, here the applicable statute, regulations, and the 1975 NC DOT manual provide that NC DOT has the exclusive authority to determine the proper placement of a utility pole within the right-of-way.

The 1975 NC DOT manual mandates that “[p]rior to beginning work within [a] State right-of-way, the utility owner shall obtain an Encroachment Agreement.” The 1975 NC DOT manual also mandates that a request for an encroachment agreement include “[t]he State standards for accommodating utilities[;]” “[a] general description of the size, type, nature, and extent of the utility facilities[;]” drawings or sketches of the existing or proposed utility facility; “[t]he extent of liability and responsibilities associated with future adjustment of the utilities to accommodate future highway improvement[;]” “action to be taken in case of noncompliance with State requirements[;]” “[a] Traffic Control Plan to provide for ease of traversability of the motorist[;]” and “[o]ther provisions as deemed necessary.” These encroachment agreements are submitted to NC DOT's Raleigh office or to the NC DOT division engineer, based on the type of utility structure, for approval. The 1975 NC DOT manual states,

The Division Engineer shall investigate the request and determine the acceptability of the encroachment, based on [NC DOT] utility

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accommodation policies as contained herein. Any deviations from [NC DOT] policies must be thoroughly justified and documented in the file on the particular encroachment. When the Division Engineer determines that the encroachment is acceptable, he will execute the Agreement[.]

Upon notice of completion, “[t]he Division Engineer or his designated representative shall make a final inspection of all authorized encroachments on highways open to traffic.” Plaintiff included in her complaint, the affidavit of Mr. Spangler, a NC DOT district engineer, which states, in pertinent part:

3. Since the 1975 publication of the Department of Transportation’s “Policies and Procedures for Accommodating Utilities on Highway Rights of Way,” utility companies are required to obtain written permission of the Department of Transportation before placing a utility in the right-of-way of any road on the North Carolina State System

Therefore, a utility provider cannot place a utility pole in the right-of-way without an encroachment agreement and, since an encroachment agreement can only come from NC DOT, proper placement of utilities in public rights-of-way in accordance with the applicable regulations is within the sole discretion of NC DOT. NC DOT evaluates the description of the proposed or existing utility to be placed in the right-of-way and applies the guidelines for placement in the 1975 NC DOT manual to make the ultimate decision to approve or disapprove placement of utilities in the public right-of-way.

The 1975 NC DOT manual guidelines list various factors for NC DOT to consider when evaluating a utility company’s request for placement of a utility pole in a public right-of-way in the section titled, “OVERHEAD POWER AND COMMUNICATION LINES[.]” “[t]he type of construction, vertical clearance above pavement, and location of poles, guys, and related ground-mounted utility appurtenances along the roadside[.]” “the width of the border area, that is, the space between the back of [the] ditch or curb line and the right-of-way line, and its availability and suitability for accommodating such facilities[.]” and “[t]he nature and extent of roadside development and the ruggedness of the terrain being traversed[.]” The 1975 NC DOT manual also states that “[w]here ground-mounted utilities are to occupy [the space between the back of [the] ditch or curb line and the right-of-way line], they should be placed as far as practical from the traveled way and beyond the clear recovery area.”

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Specifically as to location, the 1975 NC DOT manual states that “[p]oles and related facilities on and along conventional highways in rural areas shall be located at or as near as practical to the right-of-way line. The poles should be located outside the clear recovery area for the highway sections involved.” The 1975 NC DOT manual defines the “clear recovery area” as

[t]hat portion of the roadside, adjacent to the traveled way and shoulders, having slopes safely traversable by vehicles and which has been designated as the area to be kept as free as practical from those above-ground physical obstructions that would be a hazard. The width of an area varies according to the type of highway involved and may vary on different sections of the same type of highway.

Unlike the simple standards of six inches from the side of the paved roadway, as mentioned in *Shapiro*, 38 N.C. App. at 660, 248 S.E.2d at 869, there is no standard “clear recovery area” for a particular type of roadway, as the “clear recovery area” must be determined based upon the characteristics of each particular roadway. Documents included by plaintiff with her complaint demonstrate the complexity of making a determination as to the “clear recovery area.” The American Association of State Highway and Transportation Officials’ (“AASHTO”) 1988 “Roadside Design Guide” sets forth the complex technical guidelines for calculation of a “clear recovery area,” which include variables of the design speed of the roadway, the average daily traffic, the location and grade of cut slopes or fill slopes beside the roadway, embankments, and the horizontal curve of the roadway. The AASHTO’s 1977 “Guide for Selecting, Locating, and Designing Traffic Barriers” (“the 1977 AASHTO Guide”) sets forth a mathematical engineering formula for calculation of the “clear zone width” in a curve, noting that it “should be increased on the outside of [the] curves by the amount of the tangent offset at a distance L_R into the curve. The increase should be tapered on the curve at the entrance end and on the tangent at the exit end of the curve.”⁶ The 1977 AASHTO Guide also notes that “[s]trict adherence to these [suggested clear zone width] criteria may be impractical in many situations due to limited right-of-way or other restricted conditions.” It is apparent, even with our lack of highway engineering expertise, that calculation of a “clear recovery area” for a particular roadway depends upon the design of the particular

6. On page 17 of the 1977 AASHTO Guide it further clarifies that in the calculation of a “clear zone width[:]” “R = radius of curve - ft. (m.) L_R = runout path length (Table III-E-1) - ft. (m.)” Table III-E-1 was not included in our record, as plaintiff’s exhibit included only pages 16, 17 and 60 of the Guide.

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roadway, the roadway's curvature, the amount of space available in the right-of-way, the topography of the area, the average daily traffic, other utility structures, signage, or other legally permitted structures located in the right-of-way. As NC DOT issues encroachment agreements for utilities wishing to place a pole in the right-of-way, NC DOT is charged with the duty and responsibility of applying these standards for a "clear recovery area" to each roadway. As the 1977 AASHTO Guide notes, in some instances compliance with the "suggested clear zone width" criteria may not be practical, but NC DOT has to consider each application individually to make the determination.

Here, plaintiff alleges that defendant Duke Energy was negligent in its failure to install and/or replace the subject utility pole "in a location consistent with [NC DOT] regulations[.]" However, the NC DOT guidelines themselves do not permit a determination by plaintiff as to whether the placement was proper; as the guideline factors and required calculations for determining the "clear recovery area" demonstrate, the application of the guidelines is complex and requires the expertise of the NC DOT. NC DOT has the legal authority and discretion to evaluate each application and to determine the proper location of a particular utility pole in accordance with the regulations and guidelines. Plaintiff makes no allegation that the placement of the subject utility pole *was determined by NC DOT* to be in violation of NC DOT regulations and guidelines. This is the break in the plaintiff's chain of proximate cause under *Baldwin*. Plaintiff did not allege that NC DOT has ever evaluated the location of the subject utility pole and determined that its location was in violation of the applicable regulations and guidelines.

Certainly, as plaintiff has alleged, she was injured because the utility pole was in the path of the car in which she was riding when it left the roadway, but the complaint fails to allege that NC DOT would not have approved the subject utility pole's location. We therefore have no way of knowing if it would have made any difference whatsoever to plaintiff if defendant Duke Energy had obtained a permit or encroachment agreement for the subject utility pole. It is entirely possible that NC DOT would have actually approved the location of the subject utility pole if defendant Duke Energy had properly made application for written permission. The affidavits from various NC DOT officials set forth the applicable regulations and aver only that defendant Duke Energy did not obtain written permission from NC DOT, and we accept all of these statements as true for purposes of the motion to dismiss; but the affidavits do not say that NC DOT would

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have denied a permit if one had been requested. For plaintiff to have properly pled defendant Duke Energy's location or maintenance of the subject utility pole as a proximate cause of her injuries, she must have alleged that if the pole had been in its proper location, *as determined by NC DOT*, she would have avoided injury from collision with the pole when defendant Walker ran off of the road.⁷

Plaintiff also argues that the "trial court err[ed] by failing to recognize that the Legislature has superseded Wood v. Carolina Telephone & Telegraph (228 N.C. 605, 46 S.E.2d 717 (1948)) as controlling legal authority through its grant of power to the N.C. Department of Transportation pursuant to N.C.G.S. § 136-18(10) to regulate the installation and maintenance of utility poles alongside roadways" Plaintiff contends that *Wood*, decided in 1948, is no longer controlling because the NC DOT regulations, which we have determined to be applicable safety regulations, establish defendant Duke Energy's duty and standard of care. To the extent that plaintiff argues that the Legislature has granted "power to the N.C. Department of Transportation pursuant to N.C. Gen. Stat. § 136-18(10) to regulate the installation and maintenance of utility poles alongside roadways[,]" we agree with plaintiff. As discussed above, the legislature did grant that power to NC DOT, and only to NC DOT. But we reject plaintiff's argument that this grant of regulatory power to NC DOT superseded *Wood* for two reasons. First, the Supreme Court recognized in *Wood* that the pole may have been located in violation of a town ordinance, but did not deem it necessary to address this issue. 228 N.C. at 607, 46 S.E.2d at 718-19. In addition, there were allegations that various placement regulations in *Shapiro*, 38 N.C. App. at 660-61, 248 S.E.2d at 869-70 were violated, but again these regulations did not overcome *Wood's* precedent. Secondly, in *Baldwin*, 335 N.C. at 548, 439 S.E.2d at 110, our Supreme Court recognized some of the same regulations as

7. Plaintiff also alleged that federal regulations require "utilities to obtain an exemption from the applicable State Department of Transportation for placement of above-ground utility installations within the 'established clear zone' on a Federal-aid or direct Federal highway project. See 23 C.F.R. 645.209, . . . 23 C.F.R. 645.207, . . . 23 C.F.R. 645.211," These regulations require that for Federal-aid or direct Federal highway projects, the State transportation departments must adhere to a "clear roadside policy" that provides for a "clear zone" along the edge of the roadway. We note that application of these Federal regulations to this case could also result in plaintiff having to allege that placement of the subject utility pole was in violation of Federal regulatory requirements as determined by the applicable authority, state or federal. However, plaintiff conceded in her brief that "[Belmont Mount Holly Road] is not a Federal-aid or direct Federal highway project" and did not address the issues of proximate causation and the application of federal regulations to the subject utility pole, so we will not address this issue.

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pled here as safety regulations, the violation of which constituted negligence *per se*, but did not state that these regulations had any effect upon the validity of *Wood* or any of the other precedents following *Wood*, although these issues were argued before the Supreme Court in *Baldwin*. Under these circumstances, we believe that any holding that the NC DOT regulations adopted pursuant to N.C. Gen. Stat. § 136-18(10) supersede *Wood* must come from our Supreme Court, as we are bound by *Wood*, *Shapiro*, *Alston*, and *Baldwin*.

Our holding that plaintiff must allege that the proper location for the subject utility pole as determined by NC DOT in order to properly plead proximate causation is consistent with the Legislature's grant of regulatory power to the NC DOT as well as the holdings of *Wood*, *Shapiro*, *Alston*, and *Baldwin*. It is also in accord with the public policy concerns which are unavoidable in this type of case. As noted by our Supreme Court in *Sutton*, defining proximate cause in this context must include "considerations of logic, common sense, justice, policy and precedent. . . ." 277 N.C. at 108, 176 S.E.2d at 169.

Defendant Duke Energy argues that *Bender v. Duke Power Co.*, 66 N.C. App. 239, 311 S.E.2d 609 (1984) is instructive as to these public policy concerns. The plaintiff in *Bender* was injured when overhead electrical wires fell across the highway in front of his vehicle during a thunderstorm. *Id.* at 239, 311 S.E.2d at 609. The plaintiff claimed that defendant Duke Power was negligent in the placement and maintenance of the overhead power lines because first, "defendant placed its poles too close to highway I-85 for safety of highway users, and second, that because of defendant's knowledge that its wires at this I-85 crossing had been previously knocked down by lightning, the overhead wires should have been removed and placed under the highway." *Id.* at 242, 311 S.E.2d at 611. The *Bender* Court rejected the first theory, that the poles were too close to the highway, stating that

proximity of defendant's poles to I-85 would have no causal relationship to the falling down of wires supported by such poles when the poles or the wires are broken by lightning, and therefore the proximity of the poles to the highway, as a matter of law, could not have been a proximate cause of plaintiff's injury.

Id. The Court responded to the plaintiff's second theory, that the lines should have been placed underground because the lines had previously been knocked down by lightning, on principles of foreseeability. *Id.* The Court noted that as in every negligence case,

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the threshold questions are duty and proximate cause. At the threshold of duty is foreseeability. If under the circumstances of this case, defendant could have reasonably foreseen that placing its wires over I-85 might result in harm to others, it would be answerable for plaintiff's injury. Plaintiff contends that because lightning had struck these same wires previously and caused them to fall across the highway, defendant could have reasonably foreseen that it would happen again. We cannot agree. While it is clear that defendant could reasonably foresee that lightning could strike its pole lines from time to time, no one can reasonably foresee when or where lightning may strike any particular object. To agree with plaintiff would open a very expensive door. We can take judicial notice that electric lines suspended from poles may be damaged by at least four natural phenomenon over which electric utilities have no control: lightning, wind, ice, and snow. The only way to insure that overhead electric lines crossing public streets or highways might not fall down due to the forces of such natural phenomenon would be to place all such lines underground. The cost of such an undertaking would be so large and hence carry with it such considerations of public policy that it would be entirely inappropriate to establish judicially a precedent for such a requirement.

Id. at 242, 311 S.E.2d at 611-12.

Defendant Duke Energy argues that “[t]he same public policy issues and concerns apply just as much in this case as they did in *Bender*” and that this Court should “refrain from creating such a significant **judicial precedent** which would effectively impose a completely impractical and prohibitively costly requirement upon Duke Energy and all of the electrical providers in this State.” (Emphasis in original). We agree that this Court should not “establish judicially a precedent” which would effectively require all utility providers or others who have need to place structures within rights-of-way of roadways in North Carolina to place them in such a manner that it would be practically impossible for an “errant vehicle” to hit them. Our legislature and NC DOT have already considered these issues and have adopted statutes and regulations which balance the need to have certain structures within roadway rights-of-way against the safety of those who use the roadways, in addition to consideration of the costs of various alternatives. NC DOT has the duty and responsibility to consider all of the relevant factors at each location and to establish where utility structures should be located. This balance is not perfect, as

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it was devised by and is implemented by human beings, and in some truly tragic cases, the result may be grievous injury, as in plaintiff's instance, or even death. However, without the allegation of a determination by NC DOT that the subject pole was in a location which would not have been approved by NC DOT, plaintiff's complaint has not adequately pled proximate cause of her injuries by defendant's negligence *per se*. See *Hart v. Ivey*, 332 N.C. at 303, 420 S.E.2d at 177-78.

C. Negligence

[3] Plaintiff also makes allegations of ordinary negligence against defendant Duke Energy. In addition to its allegations that defendant Duke Energy failed to obtain a permit or encroachment agreement for the subject utility pole, plaintiff has alleged that defendant Duke Energy should have known that the location was dangerous, independently of any evaluation by NC DOT. As to the placement of the subject utility pole, plaintiff alleges that defendant Duke Energy (1) "regularly and routinely install[s] and/or directs the installation of utility poles as a part of its business[;]" (2) "rel[ies] upon known principles of physics, research and experience in the selection and placement of locations for utility poles[;]" (3) "hire[s], retain and employ engineers and others with specific expertise in the field of utility pole placement[;]" (4) "[is] aware that improper utility pole placement increases the likelihood of vehicle impact and vehicle occupant injury[;]" and (5) "among the scientific principles known to [defendant Duke Energy] and utilized in the selection of utility pole placement are the following:

- a. Because of centrifugal forces it is more likely for a vehicle to run off of a roadway on the outside of a curve than on the inside of a curve;
- b. Vehicle departure from the right side of the roadway in a curve arced to the left is the most common manner by which vehicles errantly leave the roadway in a curve;
- c. As applied to roadways, as the degree of the curvature increases, so does the likelihood of a vehicle leaving the roadway on the outside of the curve;
- d. Increases in the design speed of a roadway correlate with increases in the likelihood of a vehicle leaving the roadway on the outside of a curve in such a roadway; and,
- e. Increases in the speed of vehicles on a roadway correlate with an increase in the likelihood of a vehicle leaving the roadway on the outside of a curve in such roadway.

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Based on these allegations, plaintiff alleges that defendant Duke Energy was negligent in failing to (1) perform an analysis of safety to the traveling public prior to placement of the subject utility pole; (2) “investigate, appreciate, and implement appropriate engineering response[s]” to the prior collisions with the subject utility pole; (3) to reduce risks after being on notice of prior impacts to the subject utility pole; (4) locate the subject utility pole “in a location consistent with accepted industry practice;” (5) reduce the risk to the traveling public by taking additional safety measures; (6) “exercise and apply reasonable engineering judgment” in the installation and maintenance of the subject utility pole; and (7) to warn the traveling public of the known danger of operating a vehicle in the location near the subject utility pole. Although these allegations of negligence are not specifically or solely based on violations of NC DOT guidelines or regulations, they are based to a certain extent on the same guidelines or regulations as discussed above, as the determination of a “location consistent with accepted industry practice” would necessarily require compliance with NC DOT guidelines and regulations, or NC DOT would not approve the location. However, even if we consider *arguendo* plaintiff’s allegations of negligence as separate from those related to the applicable safety regulations and guidelines, the rule as stated in *Wood* and followed by *Shapiro* is still applicable to plaintiff’s allegations of ordinary negligence. *Baldwin* did nothing to change this result as to allegations of ordinary negligence. As stated above, the *Wood* Court held that, “even if we concede negligence on the part of the defendant as alleged by plaintiff, there is no allegation in the complaint which reasonably imports injury to plaintiff as a proximate result thereof[.]” because plaintiff’s negligence in leaving the roadway “was the intervening proximate cause of [plaintiff’s] injury.” 228 N.C. at 607-08, 46 S.E.2d at 719. This rule was adopted by the *Shapiro* Court which held that “the maintenance of a utility pole along a public highway does not constitute an act of negligence unless the pole constitutes a hazard to motorists using the portion of the highway designated and intended for vehicular travel in a *proper manner*.” 38 N.C. App. at 663, 248 S.E.2d at 871. Accordingly, defendant Walker’s negligence in leaving the paved roadway was the intervening proximate cause of plaintiff’s injuries, and we hold that the trial court properly dismissed plaintiff’s claims for ordinary negligence.

IV. Conclusion

The allegations of plaintiff’s complaint, treated as true, fail to state a claim that defendant Duke Energy’s negligence *per se* or

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ordinary negligence was a proximate cause of plaintiff's injuries. Dismissal of plaintiff's complaint was therefore proper and the trial court's order is affirmed.

AFFIRMED.

Judges GEER and ERVIN concur.

IN THE MATTER OF: P.O. [A MINOR CHILD]

No. COA10-204

(Filed 7 September 2010)

1. Evidence— hearsay—permanency planning hearing—no abuse of discretion

The trial court did not abuse its discretion by refusing to admit into evidence at a permanency planning hearing documents that were hearsay. While hearsay evidence may be admitted at a permanency planning hearing, given respondent's failure to offer any explanation as to why the authors of the documents were not present at trial to testify, or to offer any support for her contention that the documents were reliable, and given the Department of Social Service's strenuous objections to the documents based on lack of authenticity and reliability, the trial court's exclusion of the hearsay evidence was not so arbitrary that it could not have been the result of a reasoned decision.

2. Child Abuse, Dependency, and Neglect— neglected juvenile permanency planning order—findings of fact

The trial court's challenged findings of fact in permanency planning order were supported by the evidence.

3. Child Abuse, Dependency, and Neglect— neglected juvenile—permanency planning order

The trial court did not fail to comply with the provisions of N.C.G.S. § 7B in a permanency planning proceeding. The trial court established guardianship as the permanent plan for the juvenile, established the rights and responsibilities that remained

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with respondent, and entered an order consistent with its findings ordering guardianship of the juvenile.

4. Child Abuse, Dependency, and Neglect— neglected juvenile —permanency planning review hearing

The trial court erred by failing to provide for a permanency planning review hearing in a permanency planning proceeding and failed to satisfy the requirements of N.C.G.S. § 7B-906(b). The matter was remanded for additional findings of fact.

Appeal by Respondent from order entered 10 December 2009 by Judge John B. Carter in Robeson County District Court. Heard in the Court of Appeals 2 August 2010.

J. Hal Kinlaw, Jr. for Petitioner-Appellee Robeson County Department of Social Services.

Alston & Bird, LLP, by Lisa Byun Forman, for Guardian ad Litem-Appellee.

Jeffrey L. Miller for Respondent-Appellant Mother.

STEPHENS, Judge.

Respondent Mother (“Respondent”) appeals from the trial court’s 10 December 2009 permanency planning order awarding legal guardianship of her minor child Patricia¹ to relatives. For the reasons set forth below, we affirm in part and remand for additional findings in part.

I. Procedural History and Factual Background

Respondent suffers from multiple medical conditions, including progressive back pain, fibromyalgia, and depression. In 2004, she had lumbar fusion surgery. In April of 2007, Respondent began experiencing sudden, stabbing pain in the area of her surgical incision. Epidural steroid injections only worsened Respondent’s pain. As a result of her conditions, Respondent takes numerous analgesic medications to manage her pain. Drowsiness is a common side effect of Respondent’s medications, and combining the medications significantly increases the risk of drowsiness.

The Robeson County Department of Social Services (“DSS”) first became involved with Respondent on 19 October 2007, after

1. “Patricia” is a pseudonym.

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receiving a report that she had left Patricia, who was about two years old at the time, unattended outside her home for about one hour. Patricia has been diagnosed with Down Syndrome. When a social worker arrived to investigate the report, she found Respondent unconscious on the couch and emergency personnel on the scene. Respondent denied to the social worker that she had any history of drug or alcohol abuse, and claimed that Patricia had only been outside for a few minutes.

Following the initial investigation into the report, DSS requested that Respondent place Patricia in kinship care, and Respondent agreed to place Patricia with Regina, Respondent's cousin. Respondent then moved Patricia to a placement with Patricia's maternal grandmother. On 26 November 2007, the grandmother informed DSS that she could no longer care for Patricia. On 7 December 2007, DSS informed Respondent that she needed to have another adult in the home to supervise Patricia at all times. Respondent's father moved into her home, but moved out after an argument. As a result, on 25 February 2008, Respondent agreed to place Patricia back with Regina.

During this time period, Kelvin Sampson, a Physician's Assistant at the Fairmont Medical Clinic who provided primary health care to Respondent, informed DSS that he was concerned that Respondent's medication affected her parenting ability. Mr. Sampson attempted to find alternative methods to control Respondent's pain, but Respondent indicated to Mr. Sampson that she did not want to reduce her medication unless a court ordered her to do so.

On 14 March 2008, DSS filed a petition alleging that Patricia was a neglected juvenile in that Patricia did not receive proper care, supervision, or discipline from Respondent. The matter came on for hearing on 16 April 2008, and on 9 May 2008 the district court adjudicated Patricia neglected. Respondent maintained legal and physical custody of Patricia, but placement of Patricia remained with Regina.

Between April and September 2008, Respondent was treated for substance abuse on an outpatient basis at Southeastern Recovery Alternatives ("Southeastern"). Southeastern conducted a psychological evaluation and recommended in-patient treatment. Respondent was discharged from Southeastern when she failed to comply with treatment recommendations.

The trial court held a review hearing on 17 July 2008 and entered an amended review order on 25 August 2008. The trial court ordered

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Respondent to complete substance abuse treatment and to follow all recommendations, to continue to take her medication as prescribed, to follow recommendations from Mr. Sampson, to continue in a pain management program, and to continue supervised visits with Patricia. The court also ordered Respondent to demonstrate that she could stay awake and alert during the visits. Patricia remained in Respondent's custody, but continued in the placement with Regina.

On 7 August 2008, Mr. Sampson again informed DSS that he believed Respondent could not care for Patricia because of her medication, and that his goal was to wean her off her medication. On 9 September 2008, Mr. Sampson requested help from the pain management clinic at Pinehurst in reducing Respondent's medications. Although Respondent agreed on 22 October 2008 to go to inpatient treatment, Respondent did not attend.

On 14 January 2009, the trial court held another review hearing and entered a review order on 16 February 2009. The trial court ordered Respondent to enter inpatient treatment for addiction to pain medication, to obtain medication only as authorized by a physician, to complete pain management if recommended by her inpatient treatment, to follow recommendations by Mr. Sampson to reduce her pain medications, and to continue to attend supervised visitation with Patricia.

On 17 March 2009, Respondent was denied entry into inpatient treatment at Walter B. Jones Alcohol and Drug Abuse Treatment Center ("Walter Jones") because Respondent would not surrender her medication in order to be admitted.

Respondent was then ordered to attend Family Drug Treatment Court and did so on 8 May 2009. However, Respondent fell asleep during the court session and was refused acceptance into the program because she denied she had a problem and expressed no desire to seek alternative treatment for her pain.

Mr. Sampson referred Respondent to Dr. Thomas Florian, a pain management specialist at Hermitage Medical Clinic, for further treatment, and she saw Dr. Florian on 11 and 14 May 2009. After reviewing Respondent's history of pain medications and conducting a physical examination that revealed no neurological problems, Dr. Florian did not continue Respondent on narcotics for pain. Instead, Dr. Florian wrote Respondent a prescription for a medication to treat muscle spasms. Dr. Florian referred Respondent to the UNC Chapel Hill Pain

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Management Center for a second opinion, where she saw Dr. William Blau. Dr. Blau prescribed Respondent the same medications that she took while she was Mr. Sampson's patient. Respondent continued to see Dr. Blau and clinical psychologist Dr. Jeanne Hernandez at the Pain Management Center, and was still seeing them at the time of the permanency planning hearing.

The case came on for a permanency planning hearing on 12 November 2009. By order entered 10 December 2009, the trial court concluded “[t]hat it is in the best interest of [Patricia] that legal guardianship be awarded Regina and Jimmy² [].” The trial court thus awarded legal guardianship of Patricia to Regina and Jimmy, and released DSS and the guardian *ad litem* from further responsibility in the proceeding. On 21 December 2009, the trial court entered an order providing that Respondent should still have supervised, weekend visits with Patricia. From the 10 December 2009 permanency planning order, Respondent appeals.

*II. Discussion**A. Admission of Evidence*

[1] Respondent first argues that the trial court erred by refusing to admit into evidence a document purportedly from Walter Jones and letters purportedly from Dr. Blau and Dr. Hernandez. Respondent conceded at trial that the documents were hearsay but argued that “the statute provides for hearsay evidence specifically in the Permanency Planning hearing so long as it's relevant, reliable and necessary to determine the most appropriate disposition of the case.” We find no error in the trial court's refusal to admit the challenged documents.

Our Supreme Court has held that in child custody matters,

[w]henver the trial court is determining the best interest of a child, any evidence which is competent and relevant to a showing of the best interest of that child must be heard and considered by the trial court, subject to the discretionary powers of the trial court to exclude cumulative testimony.

In re Shue, 311 N.C. 586, 597, 319 S.E.2d 567, 574 (1984) (emphasis added). Although hearsay evidence is generally incompetent and thus inadmissible, “[a]t any permanency planning review, . . . [t]he court *may* consider any evidence, including hearsay evidence . . . , that the

2. Jimmy is Regina's husband.

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court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition.” N.C. Gen. Stat. § 7B-907(b) (2009) (emphasis added). It is clear from the permissive language of N.C. Gen. Stat. § 7B-907(b) that it is within the sound discretion of the trial court whether to include or exclude hearsay evidence at a permanency planning hearing and, thus, the trial court’s decision is reviewed on appeal only for an abuse of discretion. “An abuse of discretion occurs when the trial court’s ruling is so arbitrary that it could not have been the result of a reasoned decision.” *Chicora Country Club, Inc. v. Town of Erwin*, 128 N.C. App. 101, 109, 493 S.E.2d 797, 802 (1997) (citation and quotation marks omitted).

At the hearing, Respondent attempted to introduce into evidence a document she claimed was a 17 March 2009 form from Walter Jones that listed the reason Respondent was denied entry into the program as: “No history of substance abuse—taking medications as prescribed by her physician.” DSS objected to the document, arguing, “I’ve never seen this before. This is not what they told us. I object.” DSS also argued, “I’m going, you know, I’m going to object to its authenticity. I would object to everything. This doctor is not—I don’t even know who the—this name is. I don’t know anything about it.” Respondent argued that the document was “relevant, reliable and necessary” to the trial court’s decision. However, when the trial court asked, “[DSS] is saying that he had information different, so why is it reliable?[,]” Respondent did not respond. The trial court sustained DSS’s objection and refused to admit the document into evidence.

Respondent also sought to introduce into evidence letters purportedly from Dr. Blau and Dr. Hernandez. The letters, dated 17 September, 2 October, and 4 November 2009, indicate that the doctors did not believe Respondent needed to attend a substance abuse program, and that Dr. Blau had not “observed any direct evidence of oversedation or impairment[.]” DSS objected to the admission of the letters stating, “I want to cross-examine somebody that says that.” Respondent responded, “Although it’s hearsay evidence, Ms. (INAUDIBLE) testified she did, in fact, talk to Dr. Blau about the facts of this letter.” The trial court again sustained the objection.

While hearsay evidence may be admitted by the trial court at a permanency planning hearing, given Respondent’s failure to offer any explanation as to why the authors of the documents were not present at trial to testify, or to offer any support for her contention that the documents were reliable, and given DSS’s strenuous objections to the documents based on a lack of authenticity and reliability, we cannot

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say the trial court's exclusion of the hearsay evidence was "so arbitrary that it could not have been the result of a reasoned decision." *Chicora Country Club*, 128 N.C. App. at 109, 493 S.E.2d at 802 (citation and quotation marks omitted). Accordingly, Respondent's argument is overruled.

B. Findings of Fact

[2] Respondent next argues the trial court's findings of fact 24, 25, and 36 were erroneous because there was no evidence to support the findings. We disagree.

This Court's review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and whether the findings support the conclusions of law. *In re Eckard*, 148 N.C. App. 541, 544, 559 S.E.2d 233, 235, *disc. review denied*, 356 N.C. 163, 568 S.E.2d 192 (2002). If the trial court's findings of fact are supported by any competent evidence, they are conclusive on appeal. *In re Weiler*, 158 N.C. App. 473, 477, 581 S.E.2d 134, 137 (2003). "The trial court's conclusions of law are reviewable *de novo* on appeal." *In re D.H.*, 177 N.C. App. 700, 703, 629 S.E.2d 920, 922 (2006) (citation and quotation marks omitted).

The challenged findings of fact state:

24. That Dr. Thomas Florian, Pain Management Dr. at Hermitage Medical Center saw the [R]espondent after a referral from Kelvin Sampson, PAC and after reviewing the medical records formed an opinion that [Respondent] was not suffering from chronic pain. That Dr. Florian wanted to refer [Respondent] to Duke Medical Center but [Respondent] did not want to be w[ea]ned off the prescribed medications which include narcotic medications.

25. That [Respondent] requested to be referred to Chapel Hill[.] Dr. Florian reported that he did not see any [] abnormalities after reviewing the MRI and he did not feel she had a need for narcotic medications. Dr. Florian could not see a reason to prescribe [Respondent] narcotic medications.

. . . .

36. That Charlotte Monroe with the Drug Family Court Treatment Program testified that [Respondent] did [] attend one Drug Court session after being ordered by the Court to do so, that on that one occasion of [Respondent] attending

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Drug Court [Respondent] did fall asleep during the Court session. That due to the lack of participation by [Respondent] in the Family Drug Treatment Court Program, [Respondent] was terminated from the Family Drug Treatment Court program.

Respondent first argues there was no evidence to support the part of finding 24 that Dr. Florian formed an opinion Respondent did not suffer from chronic back pain. We disagree.

Dr. Florian testified that he did not find any “significant abnormalities” on Respondent’s MRI scan and could not find evidence of an impingement of any nerve roots that might explain Respondent’s complaints of chronic back pain. Dr. Florian further testified, “[b]ased on [Respondent’s] *physical exam*, which did not show any neurologic . . . problems going on, [I was reluctant] to continue to write [Respondent] . . . prescriptions for narcotics.” Accordingly, based on Dr. Florian’s physical examination of Respondent, he prescribed only medication to address muscle spasms, not for chronic pain. This evidence supports the trial court’s finding that Dr. Florian formed an opinion that Respondent was not suffering from chronic pain.

Respondent next argues there is no competent evidence to support finding 25. Again, we disagree.

Dr. Florian testified as follows:

I reviewed her imaging studies and . . . I also reviewed previous records and then took her history and . . . she had indicated that she had had injections and physical therapy without benefit[,] and . . . in reviewing her imaging studies, I did not identify any. . . pain generator that was from [a] nerve that had been . . . encroached on by a disk or [a] bone spur and I was a little bit reluctant, based on her *physical exam*, which didn’t show any neurologic . . . problems going on, to continue to write . . . prescriptions for narcotics.

This testimony was competent evidence to support the trial court’s finding that “Dr. Florian could not see a reason to prescribe [Respondent] narcotic medications.”

Finally, Respondent argues there was no evidence to support finding 36 that Respondent was terminated from the Family Drug Treatment Court Program due to her lack of participation. Again, we disagree.

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Charlotte Monroe, a member of the Drug Court Team, testified that Respondent attended only one session of Family Drug Treatment Court, fell asleep during the session, and expressly denied being dependent on prescription drugs. Ms. Monroe further testified that Respondent suffered from certain medical conditions which, in combination with Respondent's denial of having a dependency on pain medication, made it impossible for the Drug Court Team to determine whether the prescriptions were truly needed. These circumstances, Ms. Monroe explained, rendered Respondent "ineligible" for participation in the program. Furthermore, Ms. Monroe testified that if Respondent had participated in an in-patient treatment program for her addiction to pain medication, Respondent would have been considered eligible to participate in Family Drug Treatment Court. We conclude that Ms. Monroe's testimony is ample competent evidence to support the trial court's finding 36 that Respondent's lack of participation in the Family Drug Treatment Court program resulted in her termination from the program.

C. Compliance with N.C. Gen. Stat. § 7B-907

By her final argument, Respondent contends that the trial court committed reversible error by failing to comply with the provisions of N.C. Gen. Stat. § 7B-907.

1. Permanent Plan

[3] Respondent first argues that the trial court's order "did not establish or order a permanent guardianship or even indicate that the guardianship should be the permanent plan; nor did it appoint a guardian of the person" under N.C. Gen. Stat. § 7B-600. We disagree.

"The purpose of [a] permanency planning hearing shall be to develop a plan to achieve a safe, permanent home for the juvenile within a reasonable period of time." N.C. Gen. Stat. 7B-907(a) (2009). If, at the conclusion of the hearing, the juvenile is not returned home, the court shall consider the following factors and make written findings regarding those factors that are relevant:

- (1) Whether it is possible for the juvenile to be returned home immediately or within the next six months, and if not, why it is not in the juvenile's best interests to return home;
- (2) Where the juvenile's return home is unlikely within six months, whether legal guardianship or custody with a relative or some other suitable person should be established, and if

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so, the rights and responsibilities which should remain with the parents;

(3) Where the juvenile's return home is unlikely within six months, whether adoption should be pursued and if so, any barriers to the juvenile's adoption;

(4) Where the juvenile's return home is unlikely within six months, whether the juvenile should remain in the current placement or be placed in another permanent living arrangement and why;

(5) Whether the county department of social services has since the initial permanency plan hearing made reasonable efforts to implement the permanent plan for the juvenile;

(6) Any other criteria the court deems necessary.

N.C. Gen. Stat. § 7B-907(b) (2009). Furthermore, the trial court must also make specific findings as to the best plan of care to achieve a safe, permanent home for the juvenile. N.C. Gen. Stat. § 7B-907(c) (2009). Such plan may include appointing a guardian for the juvenile pursuant to N.C. Gen. Stat. § 7B-600 and placing the juvenile in the custody of a relative. N.C. Gen. Stat. § 7B-907(c); N.C. Gen. Stat. § 7B-903(a)(2)(b) (2009).

In this case, the trial court found, *inter alia*:

17. That [Patricia] is a special needs child who has Down Syndrome and is in need of 24 hour care.

....

19. That [Patricia] has been in kinship care with Regina [] since February 26, 2008.

....

21. . . . That the use of prescription drugs and [Respondent's] medical conditions ha[ve] impacted the ability [of Respondent] to take care of [Patricia].

22. That . . . after being prescribed prescription medications [Respondent] has used four different pharmacies to obtain prescription medications[. T]hat some of those medications were in excess of what would have generally been prescribed by a treating physician and that was sometimes being done without the knowledge of [the] pharmacist who has

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prescribed similar medication [sic] during the times that [Respondent] obtained different prescriptions from different medical facilities.

. . . .

24. That Dr. Thomas Florian, Pain Management Dr. at Hermitage Medical Center saw the [R]espondent after a referral from Kelvin Sampson, PAC and after reviewing the medical records formed an opinion that [Respondent] was not suffering from chronic pain. That Dr. Florian wanted to refer [Respondent] to Duke Medical Center but [Respondent] did not want to be w[ea]ned off the prescribed medications which included narcotic medications.

25. That [Respondent] requested to be referred to Chapel Hill[.] Dr. Florian reported that he did not see any [] abnormalities after reviewing the MRI and he did not feel she had a need for narcotic medications. Dr. Florian could not see a reason to prescribe [Respondent] narcotic medications.

26. That [Respondent] was receiving medications with opiates, that taking of multiple medications with opiates would cause sleepiness and drowsiness.

. . . .

28. . . . Mr. Sampson has observed [Respondent] to be drowsy on at least one occasion, that [Respondent] has requested that her medications be reduced but most recently has ask[ed] that her medications be increased. . . .

29. That social worker, Brandy Locklear has transported [Respondent] to treatment and has observed while traveling [Respondent] falling asleep and wak[ing] up and speak[ing] incoherent[ly].

. . . .

36. That Charlotte Monroe with the Drug Family Court Treatment Program testified that [Respondent] did [] attend one Drug Court session after being ordered by the Court to do so, that on that one occasion of [Respondent] attending Drug Court [Respondent] did fall asleep during the Court session. That due to the lack of participation by [Respondent] in the Family Drug Treatment Court Program, [Respondent] was terminated from the Family Drug Treatment Court program.

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37. That since October, 2007 [DSS] has made reasonable efforts to assist [Respondent] in substance abuse treatment. That [Respondent] does have a substance abuse problem related to prescription medications. That [DSS] has provided [Respondent] with services through Southeastern Recovery, Walter B. Jones, Peterkin and Associates and Family Drug Treatment Court and [Respondent] has [not] [s]uccessfully completed any of the services offered, although given the opportunity.

38. That [Regina] has been the caretaker for [Patricia] for more than two years. That [Regina and Jimmy] take [Patricia] to all her doctor appointments and make[] sure that all medications for [Patricia] are filled and that she takes all her medications.

39. That [Regina and Jimmy] have two other children[,] one [who] is 13 and one who is 16 years of age[;] that [Patricia] has a strong bond with [Regina's and Jimmy's] family. That [Regina and Jimmy] are financial[ly] capable of caring for the needs of [Patricia].

40. That [Regina] is the maternal cousin to [Respondent] and [Regina] agrees to allow [Respondent] to visit with [Patricia] as long as [Respondent] is not on any drugs.

Additionally, the trial court's order entered 21 December 2009, from which Respondent does not appeal, made the following findings of fact:

1. An order was entered on November 12, 2009 granting guardianship of the minor child to Regina and Jimmy [].
2. Said order failed to specifically address visits for [Respondent].
3. [Respondent] has been exercising supervised weekend visits with her minor child, and the Court is of the opinion that said visits should continue.

Based in part on these findings of fact, the trial court concluded as follows:

2. That [Respondent] did create an injurious environment for [Patricia] by her abuse of prescription drugs in that she was mentally impaired while taking the medications to carry out the needs of [Patricia].

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4. That the Court believes that there is a high probability that it is not reasonable to believe that [Respondent] will adequately be able to prepare for the return of [Patricia] to her home within the next six months.

5. That [Respondent] has had ample opportunity on many occasions but has failed to sufficiently address her drug dependency over a two year period of time in which [Patricia] has been in the home of [Regina and Jimmy].

....

11. That [Patricia] continues to do well in her current placement with [Regina and Jimmy]. That [Patricia] is receiving all the medical, emotional, psychological and physical support that she needs to be as productive as her situation allows.

....

13. That [Patricia] does receive speech, occupational and physical therapy and will continue to receive these services to help with her everyday needs.

14. That [Regina and Jimmy] do have a stable home and have the ability and are financially capable of caring for [Patricia]. [Regina and Jimmy] are willing and able to provide for the needs of [Patricia].

15. That because of [Respondent's] possible deteriorating medical condition . . . , it is [] the Court's opinion that the pain and other impairment that [Respondent] suffers from will not improve within the next six months.

16. That [DSS] has exhausted all reasonable and available means to reunite [Respondent] with [Patricia]. That all reasonable efforts have [been] exhausted and [DSS] has made diligent and specific efforts to assist [Respondent] in her substance abuse recovery.

....

18. That it would not be in the best interest of [Patricia] to return to the home of [Respondent], that it would be contrary to the welfare of [Patricia] to be return[ed] to the home of [Respondent]. That [Respondent] continues to suffer from substance abuse problems of prescription medications and

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also other physical ailments which hinder her from being able to properly care for [Patricia].

19. That [Respondent] has failed to make reasonable progress in a substantial period of time of almost two years in correcting the circumstances and conditions which led to [Patricia's] removal.

. . . .

21. That it is in the best interest of [Patricia] that legal guardianship be awarded to Regina and Jimmy [].

The trial court thus ordered:

1. That it is in the best interest of [Patricia] that legal guardianship be awarded to relatives, Regina and Jimmy [].

2. That Regina and Jimmy [] shall have the authority to arrange and sign for any medical, dental, psychiatric, psychological, [or] other health care treatment or evaluation, enrollment in school, making educational decisions, enlisting in the armed forces or marriage that is deemed to be in the best interest of [Patricia].

3. That [DSS] and the Guardian ad Litem are released from further responsibility in this proceeding.

The findings of fact comprehensively address factors 1, 2, 4, 5, and 6 enumerated in N.C. Gen. Stat. § 7B-907(b) and fully support the trial court's conclusion that guardianship with Regina and Jimmy is in Patricia's best interest. Although the order does not explicitly use the term "permanent" in declaring the best plan of care to achieve a safe, permanent home within a reasonable period of time for Patricia, "[t]he *purpose* of [a] permanency planning hearing shall be to develop a plan to achieve a safe, permanent home for the juvenile within a reasonable period of time." N.C. Gen. Stat. § 7B-907(a) (emphasis added). It can thus be reasonably inferred from the findings of fact, conclusions of law, and decretal provisions which award guardianship to Regina and Jimmy, release DSS and the guardian *ad litem* from further responsibilities in this matter, and do not outline any further steps that Respondent must take, that the trial court intended to establish guardianship with Regina and Jimmy as the permanent plan for Patricia. Additionally, although the trial court did not explicitly state that it was appointing Regina and Jimmy as Patricia's guardians

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under N.C. Gen. Stat. § 7B-600, it can be reasonably inferred from the trial court's order, which states "[t]hat Regina and Jimmy [] shall have the authority to arrange and sign for any medical, dental, psychiatric, psychological, [or] other health care treatment or evaluation, enrollment in school, making educational decisions, enlisting in the armed forces or marriage that is deemed to be in the best interest of [Patricia,]" that Regina and Jimmy were appointed Patricia's guardians in accordance with that statute. *See* N.C. Gen. Stat. § 7B-600 ("The guardian may consent to certain actions on the part of the juvenile in place of the parent including (i) marriage, (ii) enlisting in the armed forces, and (iii) enrollment in school. The guardian may also consent to any necessary remedial, psychological, medical, or surgical treatment for the juvenile.").

Nonetheless, Respondent argues that even if the trial court established guardianship as the permanent plan for Patricia, the trial court failed to establish the rights and responsibilities that should remain with Respondent pursuant to N.C. Gen. Stat. § 7B-907(b)(2). We disagree.

The trial court's order entered 21 December 2009, from which Respondent does not appeal, ordered:

A. That [Respondent] shall exercise visits with her minor child every other weekend, from Friday 6:00 p.m. to the following Sunday at 6:00 p.m., beginning December 25, 2009.

B. Said visits shall be supervised by either the maternal grandmother, maternal grandfather or the maternal uncle of the minor child.

This order clarifies Respondent's visitation rights with respect to Patricia. Moreover, in the order on appeal, the trial court specifically states that Regina and Jimmy "shall have the authority to arrange and sign for any medical, dental, psychiatric, psychological, [or] other health care treatment or evaluation, enrollment in school, making educational decisions, enlisting in the armed forces or marriage that is deemed to be in the best interest of [Patricia]." Thus, these orders together give full custodial and legal rights of Patricia to Regina and Jimmy, with supervised visitation rights to Respondent.

Respondent further argues that the trial court erred by failing to "direct DSS to make reasonable efforts in accordance with a permanent plan, or to complete steps to finalize a permanent plan, or to document a case plan[,]" as required by N.C. Gen. Stat. § 7B-907(c). Again, we disagree.

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Pursuant to N.C. Gen. Stat. § 7B-907(c),

the court shall enter an order *consistent with its findings* that directs the department of social services to make reasonable efforts to place the juvenile in a timely manner in accordance with the permanent plan, to complete whatever steps are necessary to finalize the permanent placement of the juvenile, and to document such steps in the juvenile's case plan.

N.C. Gen. Stat. § 7B-907(c) (emphasis added). In this case, “consistent with its findings” that “[DSS] has exhausted all reasonable and available means to reunite [Respondent] with [Patricia]” and that “it is in the best interest of [Patricia] that legal guardianship be awarded to Regina and Jimmy[,]” the trial court ordered that guardianship of Patricia be awarded to Regina and Jimmy, and released DSS and the guardian *ad litem* from further responsibility in this proceeding. As Patricia had already been living with Regina and Jimmy for two years before entry of the order at issue, no further steps were necessary to place Patricia in Regina and Jimmy's home in a timely manner or to finalize Patricia's permanent plan. Accordingly, we conclude that the trial court's order complied with N.C. Gen. Stat. § 7B-907(c).

2. Permanency Planning Review

[4] Respondent next argues that the trial court erred by failing to provide for a permanency planning review hearing as required by N.C. Gen. Stat. § 7B-907(a). We agree.

Pursuant to N.C. Gen. Stat. § 7B-907(a), “[i]n any case where custody is removed from a parent, . . . the judge shall conduct a review hearing designated as a permanency planning hearing within 12 months after the date of the initial order removing custody[.]” N.C. Gen. Stat. § 7B-907(a). “Subsequent permanency planning hearings shall be held at least every six months thereafter, or earlier as set by the court, to review the progress made in finalizing the permanent plan for the juvenile, or if necessary, to make a new permanent plan for the juvenile.” *Id.* However, “[i]f at any time . . . findings are made in accordance with [N.C. Gen. Stat. §] 7B-906(b), the court shall be relieved of the duty to conduct periodic judicial reviews of the placement.” N.C. Gen. Stat. § 7B-907(c). Pursuant to N.C. Gen. Stat. § 7B-906(b),

the court may waive the holding of review hearings required . . . if the court finds by clear, cogent, and convincing evidence that:

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(1) The juvenile has resided with a relative or has been in the custody of another suitable person for a period of at least one year;

(2) The placement is stable and continuation of the placement is in the juvenile's best interests;

(3) Neither the juvenile's best interests nor the rights of any party require that review hearings be held every six months;

(4) All parties are aware that the matter may be brought before the court for review at any time by the filing of a motion for review or on the court's own motion; and

(5) The court order has designated the relative or other suitable person as the juvenile's permanent caretaker or guardian of the person.

N.C. Gen. Stat. § 7B-906(b).

In this case, the trial court did not explicitly waive the holding of future permanency planning hearings. However, by virtue of the fact that the trial court released DSS and the guardian *ad litem* from further responsibility in this proceeding, it can be inferred that the trial court did not contemplate a future permanency planning hearing under N.C. Gen. Stat. § 7B-907(a). Even so, the trial court failed to make findings of fact regarding all of the criteria set forth in N.C. Gen. Stat. § 7B-906(b). Specifically, the trial court failed to find that “[n]either the juvenile's best interests nor the rights of any party require that review hearings be held every six months” or that “[a]ll parties are aware that the matter may be brought before the court for review at any time by the filing of a motion for review or on the court's own motion[.]” N.C. Gen. Stat. § 7B-906(b)(3) and (4). As the trial court's order fails to satisfy the requirements of N.C. Gen. Stat. § 7B-906(b), we reverse on this issue and remand the case to the trial court to make additional findings of fact consistent with this opinion and the requirements of N.C. Gen. Stat. § 7B-906(b).

AFFIRMED in part; REVERSED and REMANDED in part.

Judges STEELMAN and ERVIN concur.

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TODD M. BODINE AND JANET L. PACZKOWSKI, PLAINTIFFS v. HARRIS VILLAGE
PROPERTY OWNERS ASSOCIATION, INC., DEFENDANT

No. COA09-1458

(Filed 7 September 2010)

1. Appeal and Error— partial summary judgment—interlocutory order—directed verdict—final order

The denial of a motion for partial summary judgment was not a final order and was not reviewed on appeal, but the subsequent directed verdict was final and the directed verdict standard of review applied.

2. Deeds— restrictive covenants—homeowners association approval of structure

In a homeowners association (HOA) action that was filed after the effective date of the 2005 revisions of the Planned Community Act, the trial court did not err by granting defendant HOA a directed verdict in a declaratory judgment action with the central issue of whether the HOA had approved a structure on plaintiffs' property before construction began. There was no set of facts or circumstances under which the plaintiffs could show approval.

3. Attorney Fees— homeowners association—violation of covenants

Attorney fees awarded to a homeowners association were not authorized pursuant to N.C.G.S. § 47F-3-120 because they did not involve the imposition of an assessment, the only basis for such charges in the declaration or bylaws. However, these charges were permitted by N.C.G.S. § 47F-3-102 (12) and N.C.G.S. § 47F-3-116, which permitted the imposition of fines for violations of the declarations, bylaws, rules, and regulations of the association.

Appeal by plaintiffs from an order denying partial summary judgment entered on 5 February 2009 by Judge Edwin G. Wilson, Jr. in Iredell County Superior Court and from a corrected order entered on 22 April 2009 by Judge Mark E. Klass in Iredell County Superior Court. Heard in the Court of Appeals on 24 March 2010.

Eisele, Ashburn, Greene & Chapman, PA, by Douglas G. Eisele, for plaintiff appellants.

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Forman Rossabi Black, P.A., by T. Keith Black, for defendant appellee.

HUNTER, JR., Robert N., Judge.

Plaintiffs, Todd M. Bodine and Janet L. Paczkowski (collectively “Homeowners”) built a 14 x 42 foot pool house and tiki hut (covered porch) to adjoin their home, but only received permission from the Harris Village Property Owners Association’s Board of Directors (“Association”) to build a 10 x 14 foot pool house. Litigation ensued, resulting in two orders denying Homeowners’ claims.

Homeowners appealed both orders. Homeowners’ first contention on appeal asserts that the court erred by denying summary judgment on Homeowners’ declaratory judgment action, which requested that the trial court: (1) declare that the Association’s restrictive covenants do not prohibit the structure that Homeowners sought to erect, and (2) declare that the attorneys’ fees provision of the restrictive covenants are not applicable to enforcement of violations of the architectural provisions of the restrictive covenant. Homeowners further argue that the court erred by directing a verdict against them on the grounds that there existed credibility issues requiring jury resolution and authorization issues regarding the ability of the Board to enforce architectural restrictions which are not embodied in the filed restrictive covenants. We disagree and affirm the orders of the trial court.

I. Jurisdiction

[1] Homeowners assert that Judge Klass’s 22 April 2009 corrected order directing a verdict finally disposed of all legal issues unresolved by Judge Wilson’s 5 February 2009 summary judgment order. Upon the entry of the latter order, they contend that *both* orders became “final” for purposes of invoking this Court’s jurisdiction under N.C. Gen. Stat. § 7A-27(b) (2009). The Association does not contest that Judge Klass’s order is a final judgment, but it contends Judge Wilson’s denial of Homeowners’ motion for summary judgment is not reviewable on appeal and should be dismissed. We agree with the Association on this jurisdictional issue.

“[T]he denial of a motion for summary judgment is not reviewable during appeal from a final judgment rendered in trial on the merits.” *Harris v. Walden*, 314 N.C. 284, 286, 333 S.E.2d 254, 256 (1985). Moreover, a pretrial order denying summary judgment has no

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effect on a later order granting or denying a directed verdict on the same issue or issues. *See Edwards v. Northwestern Bank*, 53 N.C. App. 492, 495, 281 S.E.2d 86, 88, *disc. rev. denied*, 304 N.C. 389, 285 S.E.2d 831 (1981).

Clinton v. Wake County Bd. of Educ., 108 N.C. App. 616, 621, 424 S.E.2d 691, 694 (1993).

Therefore, this Court will not review any assignments of error alleged by Homeowners that are either (1) based upon the denial of summary judgment or (2) wherein Homeowners contend that because of the denial of summary judgment, the subsequent directed verdict was improper.

To the extent the contentions made by the parties on the issues discussed in the appeals regarding summary judgment are relevant to the remaining issues regarding directed verdict, we have considered those contentions and address them herein. We, therefore, review the two remaining issues under the appropriate standard of review discussed hereinafter as those issues derive from the trial court's entry of a final order pursuant to N.C. Gen. Stat. § 7A-27(b).

II. Facts and Procedural History

On 10 March 1999, the Niblock Development Corporation (“the Declarant”) filed a Declaration of Covenants, Conditions and Restrictions for Harris Village (“CCRs”) in the Iredell County Registry. The CCRs impose restrictions on the residential lots and common areas of the Harris Village Community and disclose the Declarant's intention to establish a homeowner's association (“HOA”) as a means of enforcing the restrictions contained in the covenant. Articles of Incorporation for the HOA were filed on 16 March 1999, and Bylaws were adopted on 23 March 1999.

The Bylaws of the HOA provide that the affairs of the Association are to be managed by the Board of Directors. Among these powers are the powers to “exercise for the [HOA] all powers . . . vested in or delegated to the [HOA] and not reserved to the membership by other provisions of these Bylaws[.]”

Article VI of the CCRs, entitled “Architectural Control,” provides for an “Architectural Committee” (“the Committee”) to be appointed by the Board of Directors of the HOA following the termination of the Declarant's ownership interest in the property. The terms of the Architectural Control provisions contained within Section 4 of the

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CCRs provide that “no structure shall be erected on any Lot without the approval of the Committee as provided in this section.” Section 6 of this Article further provides that

[a]fter completion of approved construction . . . no material change shall be made to any structure on a Lot without the approval of the Committee. Prior to making any material changes to any structure on a Lot, . . . the Owner shall submit to the Committee all plans and specifications covering such proposed change. The Committee shall have the absolute and exclusive right to refuse to approve the proposed plans and shall notify the Owner of its approval or disapproval within 30 (thirty) days of receipt of the plans from the Owner.

Articles V, VII, and IX of the CCRs provide an enforcement mechanism for violations of the restrictive covenants contained therein. These provisions provide that the HOA may file a lien for assessments, including reasonable attorneys’ fees, and may bring suits in law and equity to enforce the provisions of the CCRs. Among the remedies allowed is the ability to enter any lot and take remedial action to cure non-conforming structures.

Article IX, Section 5 provides as follows:

The provisions contained hereinafter in this Declaration [the CCRs] notwithstanding, nothing herein contained shall be construed so as to be in conflict with, or contrary to, those provisions of Chapter 47E [sic] of the North Carolina General Statutes, entitled the “North Carolina Planned Community Act,” which are to take precedence, or be controlling, over the content of a Declaration (as defined therein).

Sometime after the CCRs were filed, the HOA’s members adopted an Interpretation and Clarification of the HOA Existing Covenants, Conditions and Restrictions (hereinafter “Interpretation”) which is dated 14 August 2003. Paragraph 4 of the Interpretation reads as follows:

4. Accessory buildings (to include tool sheds, storage or utility buildings) are to be placed no closer than 3 feet from the rear and side property lines or side street setbacks. The maximum size (area) allowed for any accessory building is 320 square feet.

This Interpretation was not registered in the county records.

Homeowners obtained lot 13 in Harris Village by a deed dated 22 August 2006, and by April of 2007 Homeowners had personally

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received, and were aware of the requirements contained in, the restrictive covenants which provided that architectural committee approval was required prior to adding a structure to any lot in the subdivision.

In March 2007, Homeowners began planning an addition of a swimming pool and a covered deck to their Harris Village lot.¹ Mike Blaney (“Blaney”) was then the President of the HOA and a sketch of Homeowners’ plan was given to him around 16 April 2007. Thereafter, a number of modified sketches were provided to Blaney on graph paper.

The HOA has a form entitled “Architectural Requests/Approvals, which reads as follows:

Reminder—please submit an Architectural Request form prior to commencing any work requiring Committee approval. This includes, but is not limited to, increasing width of driveways, extending walkways, play structures, decks, retaining walls, and any and all structural improvements to your property. Submit all Architectural Request forms to Mike Blaney 10 working days prior to the start date of an architectural project. A verbal approval will be given to commence work with the paperwork following shortly after. If you have any architectural questions, please call Mike[.]

Blaney delivered to the Homeowners a “Request for Architectural Approval” prior to 3 May 2007.

After giving Blaney a number of preliminary drafts of their improvements, some of which illustrated a 42 x 10 foot covered deck, Homeowners filled out the form and returned it to Blaney on 3 May 2007. Because no Architectural Committee had been appointed as provided for in the CCRs, pursuant to the Bylaws, the Board of Directors acted as the Architectural Committee. Homeowners contend that Blaney gave preliminary oral approval for Homeowners to proceed. Subsequently, without notice to Homeowners, the Board of Directors held a meeting on the night of 17 July 2007 at which Homeowners’ request for approval was submitted to and considered by the HOA Board of Directors.

On 18 July 2007, a concrete company employed by Homeowners poured the concrete deck measuring 14' x 42' that would underlie the pool house (14' x 10') and the patio/deck (14' x 32') creating a structure measuring 14' x 42' (588 square feet). Later, on the morning

1. The construction of the swimming pool is not contested in this proceeding.

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of 18 July 2007, Blaney called Homeowners to say that there was a problem and that any further concrete pouring should cease; however, at that time, all the concrete that was necessary for the project had already been poured. At the request of Homeowners, a meeting of the HOA Board of Directors was held on 18 July 2007. After that meeting, it appeared that the parties had an understanding; however, it later became apparent that no agreement had been reached. The understanding of the HOA Board of Directors is reflected in the minutes of the 18 July 2007 meeting and reads as follows:

The Board approved the cement pad and a 10 x 14 *detached pool house*. Mr. Bodine and the Board members signed the approval to be filed with the Association records. The Board encouraged Mr. Bodine to obtain a building permit for an addition to his home. The addition would be under the jurisdiction of the Town of Mooresville regulations and would not be governed by the Covenants of the Harris Village HOA, except for architectural details. The addition would have to meet all of the Town of Mooresville Requirements.

At the conclusion of the meeting, Mr. Bodine stated that he would go to the Town of Mooresville Planning Department to obtain a permit for an addition to his home and submit paperwork to the Board prior to construction continuing on his property.

(Emphasis added.)

Homeowners subsequently filed a building permit application with the Town of Mooresville, which included a pool house measuring 10' x 42', and obtained a permit for that structure. Assuming that since the Town of Mooresville had permitted the larger structure, and therefore the HOA Board of Directors would approve the larger structure, Homeowners left on 19 July 2007 for a trip and did not return until 7 August 2007. Upon their return, Homeowners received a letter from the HOA dated 23 July 2007, asserting that Homeowners were in violation of the CCRs because the construction “appears to be a detached building more than 320 square feet instead of an addition to your home. . . . Construction of the covered porch needs to cease immediately.” At the time Homeowners received the letter, the pool had been completed and the contractor had started work on the covered porch attached to the residence.

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On 1 November 2007, Homeowners filed a declaratory judgment action seeking a declaration that the CCRs did not prevent them from erecting a 320-square-foot-covered porch on their residential lot in the subdivision. This complaint was subsequently amended on 12 March 2008.

On 11 January 2008, the HOA Board of Directors filed a motion to dismiss and counterclaim seeking fines, declaratory and injunctive relief, and attorneys' fees. Afterward, the HOA Board of Directors met on 11 December 2007 and found Homeowners in violation of the CCRs. Homeowners were advised that a daily fine of \$100.00 would be imposed beginning 3 January 2008, and would continue until the alleged violations were remedied. When Homeowners did not respond, defendant HOA, on 15 February 2008, filed a Claim of Lien against Homeowners' property.

Following discovery, Homeowners filed a motion for summary judgment which was denied. A trial of this matter came on before Judge Mark E. Klass on 2 February 2009. At the conclusion of Homeowners' evidence, defendant HOA made a motion for directed verdict, which was denied. At the close of all evidence, Judge Klass granted a directed verdict for HOA. In his order, Judge Klass awarded attorneys' fees totaling \$96,000.00 to HOA's counsel, granted the HOA liens for fines totaling \$39,700.00, and ordered that the 14 x 42 foot structure be removed. The court, however, allowed Homeowners to keep their pool and the 10 x 14 foot pool house. In addition, the HOA was given permission to foreclose on the house in the event that Homeowners did not comply with the court's orders by a specified date. From this order, Homeowners filed a timely notice of appeal.

III. Standard of Review

The standard of review on denial of a directed verdict is well established and has most recently been reiterated by our Supreme Court as follows: "The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 720, 693 S.E.2d 640, 643 (2009) (quoting *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991)). The Court further provided that "[a] directed verdict and judgment notwithstanding the verdict are therefore 'not properly allowed "unless it appears, as a matter of law, that a recovery cannot be had by the plaintiff upon any view of the facts which the evidence reasonably tends to establish." ' ' *Id.* (citations

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omitted). We apply this standard of review to the question of whether the trial court erred by granting defendant HOA's motion for directed verdict at the close of all evidence.

The second and final issue on appeal is whether the trial judge had the statutory authority to impose attorneys' fees pursuant to N.C. Gen. Stat. §§ 47F-3-107.1 and -120 (2009). Issues involving statutory interpretation "are questions of law, which are reviewed *de novo* by an appellate court." *In re Proposed Assessments v. Jefferson-Pilot Life Ins. Co.*, 161 N.C. App. 558, 559, 589 S.E.2d 179, 180 (2003).

IV. Analysis

[2] Our Supreme Court in *Wise v. Harrington Grove Cmty. Ass'n*, 357 N.C. 396, 584 S.E.2d 731 (2003), discussed the statutory history of the Planned Community Act ("PCA") which it described as a series of statutes regulating the creation, alteration, termination, and management of planned subdivision communities. N.C. Gen. Stat. § 47F-1-101 (2009), *et seq.* Harris Village was established after 1 January 1999, the effective date of the PCA, when Niblock Development Corporation filed the CCRs in the Iredell County Registry. These CCRs established complex regulations and restrictions to which purchasers of the Harris Village lots would be subject. The CCRs specifically regulated Harris Village homeowners' decisions regarding "architectural" developments that homeowners may desire to erect on their property. The CCRs provide that an architectural committee is to be appointed by the Board of Directors. The CCRs further give that committee the right to decide, in its sole and absolute discretion, the precise site and location of any structure placed upon any lot. The central legal issue before the trial court and on appeal is whether an appropriate body or agent of the HOA approved a 10 x 42 foot structure on Homeowners' property before its construction had begun.

The philosophy of North Carolina restrictive covenant law is extensively discussed by the Supreme Court in *Wise*, 357 N.C. 396, 584 S.E.2d 731:

As a general rule, "[r]estrictive covenants are valid so long as they do not impair the enjoyment of the estate and are not contrary to the public interest." *Karner*, 351 N.C. at 436, 527 S.E.2d at 42; *cf. Bicycle Transit Auth., Inc. v. Bell*, 314 N.C. 219, 228, 333 S.E.2d 299, 305 (1985) (describing freedom of contract generally). Restrictive covenants are "legitimate tools" of developers so long as they are "clearly and narrowly

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drawn.” *J.T. Hobby & Son, Inc. v. Family Homes of Wake Cty., Inc.*, 302 N.C. 64, 71, 274 S.E.2d 174, 179 (1981). The original parties to a restrictive covenant may structure the covenants, and any corresponding enforcement mechanism, in virtually any fashion they see fit. *See Runyon v. Paley*, 331 N.C. 293, 299, 416 S.E.2d 177, 182 (1992) (“an owner of land in fee has a right to sell his land subject to any restrictions he may see fit to impose”). A court will generally enforce such covenants “to the same extent that it would lend judicial sanction to any other valid contractual relationship.” *Karner*, 351 N.C. at 436, 527 S.E.2d at 42 (quoting *Sheets v. Dillon*, 221 N.C. 426, 431, 20 S.E.2d 344, 347 (1942)). As with any contract, when interpreting a restrictive covenant, “the fundamental rule is that the intention of the parties governs.” *Long v. Branham*, 271 N.C. 264, 268, 156 S.E.2d 235, 238 (1967).

Id. at 400-01, 584 S.E.2d at 735-36.

Therefore, under the common law, developers and lot purchasers were free to create almost any permutation of homeowners association the parties desired. Not only could the restrictive covenants themselves be structured as the parties saw fit, a homeowners association enforcing those covenants could conceivably have a wide variety of enforcement tools at its disposal.

Our Supreme Court’s decision in *Wise*, interpreting the 1999 version of the Planned Community Act, required a community to specifically adopt the penalty and enforcement provisions of the Act before it could levy fines and be awarded attorneys’ fees. *Wise* was subject to some academic criticism. *See Hedrick, Wise v. Harrington Grove Community Association, Inc.: A Pickwickian Critique*, 27 Campbell L. Rev. 139 (2005). In 2005, the General Assembly amended the Planned Community Act and reversed the ruling of *Wise* in part. Prior to 2005, in order for planned communities to come within the statutory framework of the Act, the declaration and bylaws of the community had to specifically adopt the Act’s statutory benefits and scheme. After passage of section 20 of the 2005 Session Laws, the PCA’s provisions applied, unless the declaration and bylaws opted out of the Act. N.C. Gen. Stat. § 47F-3-102, 2005 Sess. Laws ch. 422, § 20.

Because Harris Village was incorporated after 1999 and this action began after the effective date of the 2005 revisions of the Act, our decision in *Moss Creek Homeowners Assoc., Inc. v. Bissette*, — N.C. App. —, — S.E.2d — (filed 2 February 2010), 2010 N.C. LEXIS

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446, has no application. Furthermore, the 2005 revisions to the PCA established two independent methods by which a homeowner's association could enforce its declarations—the first, by the mechanisms established in the homeowners association's declarations, and the second, by the Planned Community Act.

An examination of the recorded declarations of Harris Village reveal in Article IV that a written certificate of approval is required before a structure can be built or a material modification may be made to a dwelling in the development. The questions which Homeowners seek to have the jury resolve ignore the fact that under the legal mechanism established by the CCRs, the homeowner must make a request for approval of a new structure or a modification of an old structure and receive a certificate of approval from the appropriate board. Without this certificate of approval, the CCRs state that the homeowner may not proceed.

The other questions raised by Homeowners confuse the two methods for enforcement of the CCRs. This confusion may be understandable; however, the 2005 amendments to the PCA have clarified any confusion which may have been the result of the *Wise* decision. The architectural committee's approval of a homeowner's proposal under the CCRs and the impositions of fines under the Planned Community Act, as revised, are two distinct procedures. As to the architectural approval process, Homeowners argue that the disapproval of their request for modification was illegal since the HOA Board of Directors did not appoint an architectural committee, as required in Article VI of the CCRs. Furthermore, Homeowners contend, pursuant to the CCR's Bylaws and North Carolina statutory law, that the Board of Directors must appoint other boards, including an adjudication committee, in order to impose the fines authorized by N.C.G.S. § 47F-3-107.1, *et seq.*

With regard to Homeowners' contention, we note that they do not cite any controlling statute, case law, regulation or covenant restriction that limits the HOA Board of Directors from appointing themselves to these posts. Moreover, we think Homeowners' contention clearly ignores the Bylaws of the HOA, which allow the Board of Directors to "exercise for the [HOA] all powers, duties and authority vested in or delegated to the [HOA] and not reserved to the membership by other provisions of these Bylaws [or] the Articles of Incorporation of the [CCR]." Without any authority to the contrary, we must agree that the Board of Directors had the authority to act for the HOA as the architectural committee and adjudication committee.

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Homeowners next contend that the Board of Directors violated its statutory procedures when it imposed fines pursuant to N.C.G.S. § 47F-3-107. Specifically, Homeowners contend that Article IX, Section 5 of the CCRs—which provides that nothing in the CCRs shall be construed to be in conflict with the PCA—prohibits the Board of Directors from levying the fines imposed in this action. For this proposition, Homeowners cite *Willow Bend Homeowners Ass'n, Inc. v. Robinson*, 192 N.C. App. 405, 664 S.E.2d 570 (2008).

On this issue *Willow Bend* reads as follows:

N.C.G.S. § 47F-3-116(e) only mandates an award of attorney's fees where the requesting party prevailed in an action "brought under this section." The type of action created by N.C.G.S. § 47F-3-116 is not one in which a homeowners' association sues on the underlying debt created by a homeowner's failure to pay an assessment. Rather, the action created by N.C.G.S. § 47F-3-116 is one in which a homeowners' association forecloses on a lien created under N.C.G.S. § 47F-3-116(a) for unpaid assessments. Plaintiff here has not sought to foreclose on a lien; rather, Plaintiff has sued on the underlying debt owed by Defendants. While N.C.G.S. § 47F-3-116(d) contemplates that a homeowners' association may bring such an action, it is not the type of action that allows the homeowners' association to collect mandatory attorney's fees under N.C.G.S. § 47F-3-116(e).

Willow Bend, 192 N.C. App. at 418, 664 S.E.2d at 578. Unlike the plaintiffs in *Willow Bend* who sought enforcement of the underlying debt, the HOA here has filed a claim of lien and is seeking to enforce it. Moreover, the Court in *Willow Bend* does not address the procedure for imposing a fine or assessment. That case instead merely addresses the statute which allows attorneys' fees to be assessed in a proceeding to enforce a lien, rather than addressing the underlying debt.

Finally, Homeowners argue that it is unfair for the Board of Directors to require that they comply with the architectural restrictions contained in the Interpretation of the CCRs. Homeowners contend that the Interpretation is not recorded and has not been legally adopted. We refrain from addressing this contention and do not believe it necessary for a jury to address this question, because whether the Interpretation of the architectural restrictions has been recorded is irrelevant to the central legal issues involved in this case. Here, the central issue is whether Homeowners received written

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approval as required by the recorded CCRs to build the structures on their property.

After reviewing the transcript and record and applying the above-cited standard, we find no set of facts or inferences from facts under which Homeowners can show that the 10 x 42 foot structure built on their property had been approved or authorized by an appropriate agency of the HOA. Furthermore, the answers to the factual questions for which Homeowners seek a jury resolution would not produce such a document. Lacking such proof or the possibility of a jury providing an answer which would result in providing the proof legally necessary for Homeowners to prevail, we affirm the decision of the trial court in directing a verdict for defendant HOA.

V. Attorneys' fees under the Planned Community Act

[3] The trial court's order awarded the HOA attorneys' fees based upon two statutes: N.C.G.S. § 47F-3-120 and N.C. Gen. Stat. § 47F-3-116 (2009). On appeal, Homeowners argue that the former statute, N.C.G.S. § 47F-3-120, precludes the award of attorneys' fees; but Homeowners fail to address the applicability of the latter statute in either their brief or reply brief. As such, the HOA petitions this Court to dismiss any consideration of the second issue and deem it abandoned.

N.C.G.S. § 47F-3-120 reads as follows:

Declaration limits on attorneys' fees.

Except as provided in G.S. 47F-3-116, in an action to enforce provisions of the articles of incorporation, the declaration, bylaws, or duly adopted rules or regulations, the court may award reasonable attorneys' fees to the prevailing party if recovery of attorneys' fees is allowed in the declaration.

Under this statute, the trial court's ability to award attorneys' fees is subject to provisions in the declaration or bylaws adopted by a homeowners association to assess attorneys' fees. The only provision in the CCRs pertaining to assessment of attorneys' fees appears in Article VI, and the only provision of the Bylaws pertaining to attorneys' fees appears in Article X, "Assessments." Both provisions only concern the collection of annual and special assessments. The fines and liens at issue on appeal do not involve the imposition of any assessment. Therefore, we must agree with Homeowners that the attorneys' fees in this case may not be awarded under N.C.G.S. § 47F-3-120.

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However, the sole exception to the provisions of this statute is N.C.G.S. § 47F-3-116. After the *Wise* opinion, the statutory mechanism provided in § 47F-3-116 was rewritten in 2005 by the legislature so that the imposition of “fees, charges, late charges and other charges imposed pursuant to G.S. §§ 47F-3-102, 47F-3-107, 47F-3-107.1 and 47F-3-115” would be enforceable as “assessments,” unless the restrictive covenants or bylaws provided to the contrary. Charges imposed under these statutes would be subject to attorneys’ fees which could be collected along with the underlying debt in a “judicial foreclosure as provided in Article 29A of Chapter 1 of the General Statutes.” N.C.G.S. § 47F-3-116(a1). The charges assessed in this proceeding appear to be charges permitted to be filed pursuant to N.C. Gen. Stat. § 47F-3-102(12) (2009), which permits, after reasonable notice and an opportunity to be heard, the imposition of reasonable fines “for violations of the declaration, bylaws, and rules and regulations of the association[.]” N.C.G.S. § 47F-3-107.1 provides a detailed procedure for imposing such fines. *See Willow Bend Homeowners Ass’n*, 192 N.C. App. 405, 665 S.E.2d 570.

From our review of the record, it appears that the HOA complied with the procedures set forth in N.C. Gen. Stat. § 47F-3-107.1 when it imposed the fines allowed by statute, unless the covenants provide otherwise. The HOA sent a notice of hearing to Homeowners on 25 July 2007, which contained the statutorily required warnings. The HOA Board of Directors imposed a \$100 a day fine on 28 September 2007, notified the homeowners by letter, sent a letter demanding compliance and notifying them of the possibility of an added obligation of attorneys’ fees, filed a claim of lien on the property, and later began a judicial foreclosure to enforce the lien. As such, we conclude that the HOA complied with the statute.

At summary judgment and on appeal, Homeowners present contentions which call into question the procedures employed by the HOA Board of Directors to disapprove the modifications to Homeowners’ property. These procedures are set forth in the CCRs. For example, they argue that the HOA Board of Directors could not act as the architectural committee or, in the alternative, that the Interpretation limiting structures to 320 square feet was not a valid restriction because it was not recorded. We have previously discussed these contentions with regard to the underlying decision not to approve the addition to Homeowners’ residence. These contentions are relevant here because Homeowners contend in substance that, unless the procedures contained in the CCRs for the architectural approval process are

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strictly followed, a fine cannot be imposed nor attorneys' fees assessed under either § 47F-3-120 or § 47F-3-116. We disagree.

Because the 2005 revised language of this statute applies to all planned communities established after 1 January 1999, unless they opt out of the statutory scheme, any enforcement mechanism contained in the restrictive covenants is independent of the statutory procedures discussed herein. The converse is also true. The statutory procedures of N.C.G.S. § 47F-3-116 are independent from the procedures required by the restrictive covenants.

VII. Conclusion

For the reasons set forth, we affirm the decision of the trial court directing verdict in favor of defendant HOA.

Affirmed.

Judges STEPHENS and ERVIN concur.

JOHN BAUER, PLAINTIFF V. DOUGLAS AQUATICS, INC. AND DOUGLAS AQUATICS
CHARLOTTE, LLC, DEFENDANTS V. CHARLOTTE SHOTCRETE, INC., CROSS-CLAIM
DEFENDANT

No. COA10-47

(Filed 7 September 2010)

Jurisdiction— personal jurisdiction—sufficient minimum contacts—no due process violation

The trial court did not err in denying defendant's motion to dismiss an action arising out of a swimming pool construction agreement for lack of personal jurisdiction. Defendant was subject to jurisdiction in North Carolina under N.C.G.S. § 1-75.4 and defendant had sufficient minimum contacts with North Carolina to justify personal jurisdiction. The trial court's findings of fact were supported by competent evidence, which in turn supported its conclusion of law that the court's jurisdiction of this action over defendant did not violate due process.

Appeal by Defendant Douglas Aquatics, Inc. from judgment entered 30 September 2009 by Judge Jesse B. Caldwell in

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Mecklenburg County Superior Court. Heard in the Court of Appeals
27 May 2010.

*Thurman, Wilson, Boutwell, & Galvin, P.A., by James P. Galvin,
for Plaintiff-Appellee.*

*Teague Campbell Dennis & Gorham, L.L.P., by William A.
Bulfer, for Defendant-Appellant Douglas Aquatics, Inc.*

BEASLEY, Judge.

Defendant Douglas Aquatics, Inc. (Appellant) appeals the trial court's order denying its motion to dismiss for lack of personal jurisdiction under Rule 12(b)(2) of the North Carolina Rules of Civil Procedure. Because Appellant raises the sole question of whether the exercise of personal jurisdiction over it by the North Carolina courts comports with due process and we conclude that it does, we affirm.

Appellant, a Virginia corporation performing pool construction services, also franchises several pool management and construction companies located in Virginia and North Carolina. John Bauer (Plaintiff) is a North Carolina resident. This action arises out of a swimming pool construction agreement entered into by Plaintiff and Defendant Douglas Aquatics Charlotte, LLC (DA Charlotte), a franchisee of Appellant residing in North Carolina. Alleging faulty construction, Plaintiff filed a verified complaint on 18 March 2009 against Appellant and DA Charlotte¹ for breach of warranties, breach of contract, negligence, fraud, unfair and deceptive trade practice, and agency. In its answer filed 21 May 2009, Appellant included motions to dismiss for lack of personal jurisdiction and failure to state a claim.

A hearing was held on Appellant's motion to dismiss, during which the trial court considered Plaintiff's verified complaint, Appellant's answer, an affidavit from Appellant's president Thomas G. Crouch, documentary evidence, and arguments of counsel. The trial court denied Appellant's motions to dismiss for lack of personal jurisdiction and for failure to state a claim, concluding: (1) Appellant is subject to jurisdiction in North Carolina under N.C. Gen. Stat. § 1-75.4 (North Carolina's "long-arm" statute); (2) "[Appellant] has sufficient minimum contacts with North Carolina to justify personal jurisdiction"; and (3) "Plaintiff's claims sufficiently state the essential allegations necessary to support the claims asserted." The sole basis for this appeal is the trial court's ruling on the personal jurisdiction issue.

1. Defendant DA Charlotte is not a party to this appeal.

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Initially, we note that notwithstanding the interlocutory nature of the trial court's order, the denial of Appellant's motion to dismiss on personal jurisdiction grounds is immediately appealable. *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 614, 532 S.E.2d 215, 217 (2000); *see also* N.C. Gen. Stat. § 1-277(b) (2009) ("Any interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant[.] . . .").

Standard of Review

Our courts engage in a two-step inquiry to resolve whether personal jurisdiction over a non-resident defendant is properly asserted: first, North Carolina's long-arm statute must authorize jurisdiction over the defendant. If so, the court must then determine whether the exercise of jurisdiction is consistent with due process. *Skinner v. Preferred Credit*, 361 N.C. 114, 119, 638 S.E.2d 203, 208 (2006); *see also Brown v. Meter*, — N.C. App. —, —, 681 S.E.2d 382, 387 (2009) (noting that "[w]hen personal jurisdiction is alleged to exist pursuant to the long-arm statute, the [issue] collapses into one inquiry," which is the question of minimum contacts).

The determination of whether jurisdiction is statutorily and constitutionally permissible due to contact with the forum is a question of fact. The standard of review of an order determining personal jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court.

Replacements, Ltd. v. Midwesterling, 133 N.C. App. 139, 140-41, 515 S.E.2d 46, 48 (1999) (internal citations omitted). "Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *Natl Util. Review, LLC v. Care Ctrs., Inc.*, — N.C. App. —, —, 683 S.E.2d 460, 463 (2009) (internal quotation marks and citation omitted).

Appellant disputes only the presence of federal due process requirements in challenging the court's exercise of personal jurisdiction and does not address the applicability of North Carolina's long-arm statutory authority. Therefore, we likewise confine our discussion to this issue, and our sole inquiry is whether Plaintiff's assertion of jurisdiction over Appellant comports with due process of law. Accordingly, we must determine whether the trial court's findings of fact are supported by competent evidence, which in turn support its

conclusion of law that our courts' entertainment of this action over Appellant does not violate due process.

Appellant assigns error to several of the trial court's findings of fact in that they are unsupported by competent record evidence. Specifically, Appellant contends that any of the findings based on Plaintiff's verified complaint were erroneous because the complaint was not competent evidence and, thus, the allegations therein were insufficient to support those findings. Appellant argues that the verified complaint was not based on Plaintiff's personal knowledge, such that the facts found by the trial court in reliance thereon consisted of inadmissible hearsay.

The procedural context of the personal jurisdiction challenge in the trial court guides our review of this issue:

Typically, the parties will present personal jurisdiction issues in one of three procedural postures: (1) the defendant makes a motion to dismiss without submitting any opposing evidence; (2) the defendant supports its motion to dismiss with affidavits, but the plaintiff does not file any opposing evidence; or (3) both the defendant and the plaintiff submit affidavits addressing the personal jurisdiction issues.

Banc of Am. Secs. LLC v. Evergreen Int'l Aviation, Inc., 169 N.C. App. 690, 693, 611 S.E.2d 179, 182 (2005). When the parties submit "dueling affidavits" under the third category, the trial court may decide the matter from review of the affidavits, or "the court may direct that the matter be heard wholly or partly on oral testimony or depositions." *Id.* at 694, 611 S.E.2d at 183 (internal quotation marks and citations omitted). In either case, the plaintiff bears the burden of proving, by a preponderance of the evidence, grounds for exercising personal jurisdiction over a defendant. *Adams, Kleemeier, Hagan, Hannah & Fouts, PLLC v. Jacobs*, 158 N.C. App. 376, 378, 581 S.E.2d 798, 801, *rev'd on other grounds*, 357 N.C. 651, 588 S.E.2d 465 (2003). As such, upon a defendant's motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of making out a *prima facie* case that jurisdiction exists. *Wyatt v. Walt Disney World Co.*, 151 N.C. App. 158, 162, 565 S.E.2d 705, 708 (2002).

Appellant correctly notes that when a defendant supplements its motion with affidavits or other supporting evidence, the unverified allegations of a plaintiff's complaint " 'can no longer be taken as true or controlling[.]' " *Id.* at 163, 565 S.E.2d at 708 (quoting *Bruggeman*,

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138 N.C. App. 615-16, 532 S.E.2d at 218. In that case, a plaintiff cannot rest on the complaint's allegations, even if they meet the initial burden of proving jurisdiction, "but must respond 'by affidavit or otherwise . . . set[ting] forth specific facts showing that the court has jurisdiction.'" *Id.* However, "[a] verified complaint may be treated as an affidavit if it (1) is made on personal knowledge, (2) sets forth such facts as would be admissible in evidence, and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein." *Eluhu v. Rossenhaus*, 159 N.C. App. 355, 359, 583 S.E.2d 707, 711 (2003) (internal quotation marks and citations omitted).

Here, Plaintiff's verified complaint seeks redress from faulty construction of the pool for which he contracted. Plaintiff alleges that he entered into a swimming pool construction agreement with Defendant DA Charlotte, a North Carolina limited liability company. Plaintiff also named Appellant as a defendant on the basis that DA Charlotte made the contract "on its own behalf, and as agent for Douglas [Aquatics], Inc." The allegations in his verified complaint support the assertion that jurisdiction over Appellant is proper by virtue of the services Appellant provides in North Carolina through its agent DA Charlotte. Thus, Plaintiff's verified complaint sets forth specific facts showing jurisdiction in our courts. *See* N.C. Gen. Stat. § 1-75.2(3) (2009) (providing that "acts of the defendant" subjecting it to personal jurisdiction "include[] any person's acts for which the defendant is legally responsible"). The allegations contained therein are therefore sufficient to make out a *prima facie* case of personal jurisdiction. Moreover, our review of the verified complaint confirms that it was based on Plaintiff's personal knowledge and affirmatively shows his competence to testify to the matters asserted.

The verification of the complaint states on its face that "John Bauer . . . is the Plaintiff in the foregoing action; that he has read the foregoing Complaint and knows the contents thereof, and that the same is true of his own knowledge," except for the allegations based on information and belief, which he believes to be true. Plaintiff's agency claim is based on allegations that Appellant represented on its website that DA Charlotte was "part of and an agent for [Appellant]." Plaintiff points to the specific statement appearing on Appellant's website "that [DA Charlotte] is one of five [of Appellant's] locations throughout Virginia and North Carolina and that [Appellant] opened its fifth location in Charlotte, North Carolina in 2005 trading as Douglas Aquatics Charlotte." The verified complaint attests that because Appellant's website corroborated the in-person representations

made by DA Charlotte, in reliance thereon, “entered into a contract with Defendant [DA Charlotte], on its own behalf, and as agent for [Appellant], for the construction of a . . . concrete swimming pool on [his North Carolina] property.” Plaintiff alleges that the contract identifies Appellant (and not DA Charlotte, referred to as “Contractor” in the agreement) as the party responsible for the basic construction of the pool. A copy of this construction agreement made between Plaintiff and Defendant DA Charlotte is attached to the verified complaint. Although the swimming pool construction agreement identifies DA Charlotte as “an independent license[e] of Douglas Aquatics, Inc.,” section 1 thereof provides that Appellant shall administer the basic construction. Specifically, the construction agreement sets out that “Douglas Aquatics, Inc., shall excavate for the pool” and conduct the necessary installations. Plaintiff is clearly a party to the contract and is competent to attest to the discussions that transpired during negotiations and execution of the agreement.

Plaintiff is likewise competent to offer evidence based on his personal knowledge of the representations made by Appellant on its website as it existed at the times relevant to this action. He identifies www.douglasaquatics.com as Appellant’s website, viewed and researched by Plaintiff personally, which “holds out [DA Charlotte] as an arm of [Appellant].” As indicated above, the website named DA Charlotte as one of Appellant’s five locations throughout Virginia and North Carolina. Further representations on the website announced that Appellant “has been in business since 1970” and touted its exceptional construction services, prompting Plaintiff to contact DA Charlotte. Appellant’s affidavit is devoid of any reference to its website or the contents thereof.

We conclude that Plaintiff’s verified complaint was based on his personal knowledge, sets forth facts that would be admissible in evidence, and affirmatively shows he is competent to testify to the matters stated therein; thus, it may be treated as an affidavit and constitutes competent evidence on which the trial court could base its findings of fact, which are further discussed below.

Appellant argues that even if the record evidence is competent to support the trial court’s findings, it demonstrates a lack of the requisite contact between the Virginia corporation and either Plaintiff or the state of North Carolina for our courts to exercise personal jurisdiction over Appellant without offending due process. We disagree.

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To satisfy the due process component of the personal jurisdiction inquiry, there must be sufficient “minimum contacts” between the nonresident defendant and our state “such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 85 L. Ed. 278, 283 (1940)). “In each case, there must be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws[,] . . . [and] [t]his relationship between the defendant and the forum must be such that he should reasonably anticipate being haled into court there.” *Tom Togs, Inc. v. Ben Elias Industries Corp.*, 318 N.C. 361, 365, 348 S.E.2d 782, 786 (1986) (internal quotation marks and citations omitted). “Factors for determining existence of minimum contacts include ‘(1) quantity of the contacts, (2) nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) convenience to the parties.’” *Eluhu*, 159 N.C. App. at 358, 583 S.E.2d at 710 (quoting *Bruggeman*, 138 N.C. App. at 617, 532 S.E.2d at 219).

Two forms of personal jurisdiction have been recognized by the United States Supreme Court: “‘specific jurisdiction,’ where the controversy arises out of the defendant’s contacts with the forum state, and ‘general jurisdiction,’ where the controversy is unrelated to the defendant’s activities within the forum, but there are ‘sufficient contacts’ between the forum and the defendant.” *Replacements*, 133 N.C. App. at 143, 515 S.E.2d at 49-50 (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, 80 L. Ed. 2d 404, 411 (1984)).

Specific jurisdiction exists if the defendant has purposely directed its activities toward the resident of the forum and the cause of action relates to such activities. This inquiry focuses on whether the defendant purposefully availed itself of the privilege of conducting activities in-state, thereby invoking the benefits and protections of the forum state’s laws, and jurisdiction may be proper even if the defendant has never set foot in the forum state. General jurisdiction exists where the defendant has continuous and systematic contacts with the forum state, even though those contacts do not relate to the cause of action.

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Wyatt, 151 N.C. App. at 165, 565 S.E.2d at 710 (internal quotation marks and citation omitted). Although Appellant’s brief disputes the presence of both types of jurisdiction and Plaintiff responds accordingly, the record does not support a finding of general jurisdiction. Where this cause of action arises out of Appellant’s alleged contacts with North Carolina, we limit our review to a determination of whether specific jurisdiction exists. *See Wells Fargo Bank, N.A. v. Affiliated FM Ins. Co.*, 193 N.C. App. 35, 45, 666 S.E.2d 774, 780 (2008) (“Because plaintiff’s contentions regarding [Appellant’s] minimum contacts relate to the events giving rise to this cause of action, we need not address whether general jurisdiction exists.”).

The trial court made the following contested findings of fact,² which we conclude are supported by competent evidence:

2. Plaintiff’s Verified Complaint alleges proper jurisdiction over [Appellant] by virtue of the services provided in North Carolina through its agent [DA Charlotte].

...

4. . . . [Appellant’s] website . . . describ[ed] [DA Charlotte] as another location of Douglas Aquatics, Inc. in Charlotte to provide pool construction needs in that area.

5. It reasonably appeared to Plaintiff from the website that the two Defendants were the same entity.

...

7. Defendant [DA Charlotte], by and through its Manager Gabe Ortiz, represented to Plaintiff that they had been in the pool construction industry for over thirty years as stated on [Appellant’s] website.

Appellant did not take issue with the following findings, which are thus binding on appeal:

6. [Appellant] advertised through its website that they had been in the pool construction business since 1970 and that they received multiple industry awards for their quality work.

...

8. Unbeknownst to Plaintiff, Defendant [DA Charlotte] has only been in the pool construction business since 2005.

2. Any of the trial court’s “findings of fact” which are actually conclusions of law will be treated as such.

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9. Defendant [DA Charlotte] represented to Plaintiff that [Appellant] would be responsible for the basic construction of the pool.

10. The construction contract for the pool . . . indicated on its face in Section One . . . that “Douglas Aquatics, Inc., shall excavate for the pool, install steel reinforcing bars, place concrete, install pool piping, fitting, install all filtration and swimming pool equipment, provide and install tile, install concrete coping[,] concrete decking and quarts interior, per specifications and plans”

. . . .

13. Plaintiff’s Complaint alleges that both Defendants knowingly held out [DA Charlotte], through the [Appellant’s] website, through representations made by Gabe Ortiz, and the construction contract, as the same entity and with the same experience as [Appellant] in order to induce Plaintiff to sign a contract with Defendants.

14. The affidavit of Thomas Crouch alleges that [Appellant] has no actual control over [DA Charlotte].

15. However, Defendant [DA Charlotte] represented to Plaintiff that [Appellant] and [DA Charlotte] were one in the same entity and Plaintiff reasonably relied on those representations.

Further finding Appellant’s affidavit insufficient to “rebut the allegations of apparent agency” and “the allegation that the website of [Appellant] specifically targeted citizens of North Carolina,” the trial court concluded: “Defendant [DA Charlotte] had authority, whether apparent or actual, to act as an agent of [Appellant]”; “the website as described in Plaintiff’s Complaint specifically targets North Carolina residents”; “[Appellant] solicited within this state for business”;³ and “[Appellant] was to perform service or provide materials in North Carolina.”

3. Appellant disputes the trial court’s finding of fact that “[a]n agreement exists that provides for [Appellant] to be paid Ten Percent (10%) of all pool construction revenue generated in North Carolina by [DA Charlotte],” arguing “[t]here is no evidence of any agreement which provides for [such] payment.” Indeed, the franchise agreement between Defendants, which was presented to the trial court at the hearing and is contained in the record, requires DA Charlotte to pay Appellant *five* percent (5%) of revenues generated in the Charlotte metro area from various programs, which include construction services and retail sales from products provided by Appellant for distribution by DA Charlotte. While Appellant’s argument is technically correct, the minor discrepancy in the trial court’s finding number 12 does not alter our analysis.

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Appellant argues that the trial court erred as a matter of law in concluding that it engaged in sufficient minimum contacts with North Carolina that would subject Appellant to jurisdiction in our state. Specifically, Appellant challenges the conclusion that personal jurisdiction over it is justified based on Appellant's "authority, whether apparent or actual, to act as an agent of Douglas Aquatics, Inc." and because Appellant's website "specifically targets North Carolina residents." We agree with the trial court.

Pursuant to agency principles, "vicarious liability of a franchisor for the acts of its franchisee . . . depends upon the existence of an agency relationship[.]" *Hayman v. Ramada Inn, Inc.*, 86 N.C. App. 274, 277, 357 S.E.2d 394, 397 (1987).

An agency relationship "arises when parties manifest consent that one shall act on behalf of the other and subject to his control." *Miller v. Piedmont Steam Co.*, 137 N.C. App. 520, 524, 528 S.E.2d 923, 926 (2000); see also *Hayman*, 86 N.C. App. at 277, 357 S.E.2d at 397 ("Agency has been defined by this Court as the relationship which arises from 'the manifestation of consent by one person to another that the other shall act *on his behalf and subject to his control*, and consent by the other so to act'"). "Moreover, in establishing the existence of an actual agency relationship, the evidence must show that a principal actually consents to an agent acting on its behalf." *Phillips v. Restaurant Mgmt. of Carolina, L.P.*, 146 N.C. App. 203, 217, 552 S.E.2d 686, 695 (2001). Whereas here, the defendant entities are structured as franchisee and franchisor, an actual agency relationship "is determined by the nature and extent of control and supervision retained and exercised by the franchisor over the methods or details of conducting the day-to-day operation." *Hayman*, 86 N.C. App. at 277, 357 S.E.2d at 397.

However, "an agency relationship may be deemed to exist for purposes of vicarious liability in the absence of an actual agency" under the legal theory "known alternatively as 'apparent agency' or 'agency by estoppel[.]'" *Id.* at 278, 357 S.E.2d at 397.

Where a person by words or conduct represents or permits it to be represented that another person is his agent, he will be estopped to deny the agency as against third persons who have dealt, on the faith of such representation, with the person so held out as agent, even if no agency existed in fact. The same rule applies to a corporation which holds out or permits a person (or another corporation) to be held out as its agent.

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Id. at 278-79, 357 S.E.2d at 397-98 (internal quotation marks and citations omitted). However, “[i]n determining for jurisdictional purposes the defendant’s legal responsibility for the acts of another, the substantive liability of the defendant to the plaintiff is irrelevant.” N.C. Gen. Stat. § 1-75.2(3).

Other courts have held that “[t]he contacts within the forum of a party’s agent, partner, or joint venturer may, in appropriate circumstances, be attributed to the party for purposes of establishing jurisdiction.” *Nucor Corp. v. Bell*, 482 F. Supp.2d 714, 722 (D.S.C. 2007); *see also Grand Entm’t Group v. Star Media Sales, Inc.*, 988 F.2d 476, 483 (3d Cir. 1993) (“[A]ctivities of a party’s agent may count toward the minimum contacts necessary to support jurisdiction.”). This Court, however, has only cursorily addressed agency in the personal jurisdiction context. In *Wyatt v. Walt Disney World Co.*, we held that “[a]ctions of an independent contractor are not attributable to the party hiring it, and thus do not, without more, establish jurisdiction,” citing *Miller* for the proposition that “no agency relationship between franchiser and independent contractor/franchisee [was created] where franchiser did not have any control over franchisee’s day to day operations.” *Wyatt*, 151 N.C. App. at 166, 565 S.E.2d at 710. We stated that “[t]he critical element of an agency relationship is the right of control. . . . Absent proof of the right to control, only an independent contractor relationship is established. The actions of an independent contractor *by themselves* are not sufficient to subject a nonresident corporation to the jurisdiction of a forum.” *Id.* (emphasis added) (citations omitted). Still, that case made no distinction between actual and apparent agency, as *Wyatt* appeared to be addressing the absence only of actual agency in concluding that specific personal jurisdiction could not be exercised. Other courts, however, have concluded that “personal jurisdiction may be based on contacts made by authorized agents” under standard agency principles, including apparent agency. *Noble Sec., Inc. v. MIZ Eng’g, Ltd.*, 611 F. Supp. 2d 513, 534 (E.D. Va. 2009).

[A]gency principles, including principles of apparent agency . . . are no less applicable even where the issue is personal jurisdiction rather than vicarious liability per se. That is, a number of courts have employed the concept of actual or apparent authority to exercise jurisdiction over a principal, or alternatively, have declined to exercise jurisdiction where a claimed agency relationship is not proven. *See, e.g., Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 493 (5th Cir. 1974) (to sustain burden of establishing personal jurisdiction on

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agency theory, plaintiff must present prima facie evidence of existence of agency relationship by proof that agent acted with “either actual or apparent authority”) [, *overruled on other grounds by Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 72 L. Ed. 2d 492 1982)]; see also *Sher v. Johnson*, 911 F.2d 1357, 1362 (9th Cir. 1990) (acts of agent attributable to principal for personal jurisdiction purposes); *Dotzler v. Perot*, 899 F. Supp. 416 (E.D. Mo. 1995) (analyzing personal jurisdiction under agency theory); *Damian Servs. Corp. v. PLC Servs., Inc.*, 763 F. Supp. 369 (N.D. Ill. 1991) (establishing personal jurisdiction over defendant by means of acts of agents in forum held consistent with due process).

Cowart v. Shelby County Health Care Corp., 911 F. Supp. 248, 251 (S.D. Miss. 1996); see also *Consulting Eng'rs Corp. v. Geometric Ltd.*, 561 F.3d 273, 278 (4th Cir. 2009) (stating whether a defendant business maintains an agent in forum state is a factor in resolving question of purposeful availment); *Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A.*, 290 F.3d 42, 57 (1st Cir. 2002) (“Even if the parties were not joint venturers, they held themselves out to Daynard to be part of a joint venture or other agency relationship and are subject, for personal jurisdiction purposes, to the doctrine of [agency by] estoppel.”); *Schimpf v. Gerald, Inc.*, 2 F. Supp. 2d 1150, 1162 n.2 (E.D. Wis. 1998) (“[P]ersonal jurisdiction exists based upon [the defendant’s] own solicitation and the doctrine of apparent agency[.]”); *IRA Res. v. Griego*, 221 S.W.3d 592, 596-97 (Tex. 2007) (resolving the specific jurisdiction issue based on whether or not the evidence supported a finding of apparent agency). Where N.C. Gen. Stat. § 1-75.2(3) permits the exercise of jurisdiction over a party who is “legally responsible” for certain acts, even if it did not commit them, we conclude that North Carolina’s jurisdiction over Appellant may be premised on either actual or apparent agency.

Initially, we note that none of the trial court’s findings demonstrate a sufficient measure of control between franchisor Appellant and franchisee DA Charlotte to support the conclusion that an actual agency relationship exists between the two defendants. Moreover, Appellant’s affidavit denies any right to control the methods or details of its franchisee’s daily operations, as DA Charlotte “is an independent contractor and licensee of Douglas Aquatics, Inc.” We agree that Plaintiff cannot rely on his unverified allegation that “upon information and belief, [Appellant] has control over [DA Charlotte’s] day-to-day operations and management,” where the conclusory statement was

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rebutted by Appellant's affidavit and Plaintiff failed to respond with specific facts substantiating his claim. The lack of findings and competent evidence regarding control leads us to conclude that Plaintiff has failed to prove that an actual agency relationship existed between Appellant and DA Charlotte.

While Appellant sufficiently disposes of our consideration of actual agency, it leaves unaddressed the website's creation of apparent agency. In any event, we conclude that the trial court's findings are sufficient to support the conclusion that Appellant held DA Charlotte out as its apparent agent to the citizens of North Carolina through affirmative representations on its website.⁴

The trial court found that Appellant, on its website, described DA Charlotte as one of Douglas Aquatics, Inc.'s locations that provides pool construction needs in the Charlotte, North Carolina area and that Appellant's affidavit rebutted neither the allegations of apparent agency nor that the website of Douglas Aquatics, Inc. specifically targeted North Carolina citizens. Appellant focuses its argument on the franchise agreement that "unequivocally defines the relationship between franchisee [DA Charlotte] and [itself] as independent." Indeed, the franchise agreement specifically prohibits DA Charlotte from representing itself as Appellant's agent or engaging in any activity which would purport to bind the franchisor, and Appellant argues that it is "nonsensical" to "[p]resuppos[e] the existence of [an agency] relationship in the face of uncontroverted evidence to the contrary." Appellant ignores the fact, however, that Plaintiff was never privy to the franchise agreement defining the relationship between Defendants. Instead, Plaintiff had only the words and conduct of Defendants upon which to rely in determining whether to enter the pool construction contract.

It was Appellant's statement on its website, as alleged in Plaintiff's verified complaint and uncontroverted by Appellant's

4. Appellant does discuss the website in its brief but only in the context of arguing that the website itself did not constitute the requisite minimum contacts for personal jurisdiction, and not in connection to whether Appellant represented that DA Charlotte was its agent. Because we conclude that jurisdiction over Appellant is proper based on the principle of apparent agency, we need not consider the related, but separate, issue of whether Appellant's website is sufficient in and of itself to establish purposeful availment. See *Havey v. Valentine*, 172 N.C. App. 812, 816, 616 S.E.2d 642, 647 (2005) (adopting the rule promulgated by the Fourth Circuit for determining "whether an Internet website can be the basis of an exercise of personal jurisdiction by a court"). Accordingly, our analysis of Appellant's website is limited to its impact on Plaintiff's understanding of the relationship between the two defendants.

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affidavit, that “[DA Charlotte] is one of five [of] Douglas [Aquatics], Inc.’s locations throughout Virginia and North Carolina and that Douglas [Aquatics], Inc. opened its fifth location in Charlotte, North Carolina in 2005 trading as Douglas Aquatics Charlotte” that constituted words or conduct representing or permitting it to be represented that DA Charlotte is Appellant’s agent. Where there is no evidence that Appellant did not have knowledge of the information disseminated on its own website, the statements at issue can easily be construed as a manifestation by Appellant to citizens in the Charlotte area that DA Charlotte was its agent. Moreover, it was entirely reasonable for Plaintiff to believe that an agency relationship existed based on the conduct of Appellant as the purported principal. For, Appellant’s website held DA Charlotte out as another one of its locations and thereby corroborated the in-person representations made to Appellant by DA Charlotte’s manager that his business had been in the pool construction industry for over thirty years. Additionally, even if DA Charlotte acted unilaterally in drafting the contract, the pool construction agreement provided that Appellant shall perform the basic construction. We agree with Appellant that the contract provision, in and of itself, would not have supported a reasonable belief that the Defendants were the same entity. However, Appellant’s representations on its website justified Plaintiff’s belief in the agency intimated by DA Charlotte, and his reliance thereon in entering the construction contract was consistent with ordinary care and prudence.

Accordingly, we conclude that the elements of apparent agency are met, and Appellant can be considered legally responsible for the acts of its apparent agent, DA Charlotte, for purposes of personal jurisdiction. As such, the acts of DA Charlotte committed on Appellant’s behalf during negotiations and execution of the construction contract, which both took place in Charlotte, with Plaintiff North Carolina resident, for services to be provided in this state, clearly constitute minimum contacts with the North Carolina forum. Where Appellant’s conduct and connection with North Carolina were such that it should reasonably have anticipated being haled into court in this state and “North Carolina has a ‘manifest interest’ in providing the plaintiff ‘a convenient forum for redressing injuries inflicted by’ defendant, an out-of-state merchant[,]” *Baker v. Lanier Marine Liquidators, Inc.*, 187 N.C. App. 711, 716, 654 S.E.2d 41, 45 (2007), maintenance of the suit here does not offend traditional notions of fair play and substantial justice. Therefore, we affirm the trial court’s order denying Appellant’s motion to dismiss for lack of personal jurisdiction.

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Affirmed.

Judges GEER and JACKSON concur.

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THE HANOVER INSURANCE COMPANY, DEFENDANTS

No. COA09-1409

(Filed 7 September 2010)

1. Contracts—breach of contract—unjust enrichment—written agreement—no oral modification—summary judgment proper

The trial court did not err in granting summary judgment in favor of plaintiff on its breach of contract and unjust enrichment claims arising out of a dispute over a custom-manufactured roofing and insulation system. The parties were bound by the original terms of a written purchase order and credit agreement, and no substitute oral agreement had been reached. Moreover, defendant M&M Builders, Inc. breached the terms of the agreement by failing to pay for the custom roof.

2. Contracts—breach of contract—unjust enrichment—mitigation of damages—summary judgment proper

The trial court did not err in granting summary judgment in favor of plaintiff on its breach of contract and unjust enrichment claims arising out of a dispute over a custom-manufactured roofing and insulation system as there was no genuine issue of material fact concerning whether plaintiff took reasonable steps to mitigate its damages.

Appeal by defendants from judgment entered 9 July 2009 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 24 March 2010.

Hill Evans Jordan & Beatty, PLLC, by Benjamin D. Ridings, for defendant appellants.

Smith Moore Leatherwood, LLP, by James R. Faucher and Elizabeth Brooks Scherer, for plaintiff appellee.

HUNTER, JR., Robert N., Judge.

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The trial court granted summary judgment in favor of Thermal Design, Inc. (“plaintiff”), on its claim for breach of contract and unjust enrichment against M&M Builders, Inc. (“M&M”), and the Hanover Insurance Company (collectively “defendants”). In its complaint, plaintiff alleged that M&M wrongfully failed to pay the purchase price for a custom-manufactured roofing and insulation system (the “Custom Roof”) per the parties’ written agreement. Defendants appeal the judgment, and argue that the trial court erred in granting plaintiff’s summary judgment motion because genuine issues of fact exist as to: (1) whether the parties were bound by the terms and conditions in the initial purchase order and credit agreement at the time of the alleged breach; (2) whether M&M detrimentally relied on plaintiff’s oral promise to accept a return of the Custom Roof in exchange for a restocking fee; and (3) whether plaintiff took reasonable steps to mitigate its damages.

After review, we agree with the trial court that the parties were bound by the original terms of the purchase order and credit agreement, and that M&M breached the terms by failing to pay for the Custom Roof. Since defendants have failed to raise a genuine issue of material fact for trial, we affirm the trial court’s order.

I. BACKGROUND

On 7 August 2007, M&M purchased the Custom Roof on credit by executing a purchase order and credit agreement (collectively the “Contract”).¹ The Custom Roof was purchased for \$21,595.61, and M&M planned to install the Custom Roof in the Allen Jay Recreation Center in High Point, North Carolina, a project which M&M was in the process of constructing at the time. On 30 October 2007, plaintiff and M&M executed a revised purchase order for the Custom Roof, decreasing the size of the order and reducing the price to \$18,556.25. The revised purchase order did not alter any terms or conditions in the Contract. In the credit application, the terms stated in part:

In consideration for receiving credit, the undersigned agrees to all of the terms and conditions stated in this credit contract. The terms and conditions of this credit contract will supercede any contradictory terms stated on purchase orders

1. The parties do not dispute that these separate documents together constituted a final expression as to the terms and conditions of the sale of the Custom Roof. Thus, we will construe the terms and conditions of these documents together. See *American Trust Co. v. Catawba Sales & Processing Co.*, 242 N.C. 370, 377, 88 S.E.2d 233, 238 (1955) (“When two or more papers are executed by the same parties at the same time, or at different times, and show on their face that each was executed to carry out the common intent, they should be construed together.”) (citation omitted).

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or other project documents, as a condition of granting credit. In accordance with the usage of the trade, the acknowledgment of this contract will be construed as a counter offer to any terms and conditions of the Buyer's documentation and will be construed as accepted by the Buyer for all purchases for which credit is used until full payment is made and this contract is specifically revoked in writing. . . . This agreement is a continuing general credit contract and *shall remain in effect and be non-cancellable for any charges and interest incurred under this agreement until they are paid in full. The terms of this agreement shall not be altered except with written authorization of a corporate officer of Thermal Design[,] Inc.*

(Emphasis added.)

The Custom Roof was delivered to the construction site and accepted by M&M in early November 2007. Plaintiff invoiced M&M for the full contract price on 7 November 2007 with payment due in full by 7 December 2007. Following the invoice, M&M sent no payment.

On 17 December 2007, M&M's vice president, Greg Mauldin, contacted plaintiff and spoke with a salesman named Travis Mettenbrink. In the conversation, Mr. Mauldin explained that the steel erection subcontractor working on the Allen Jay Recreation Center project had informed him that "use of the materials delivered by [plaintiff] would require numerous penetrations of the materials by various trades and that a substitute insulation system should be used instead of [plaintiff's]." Mr. Mauldin claimed, after the conversation, that Mr. Mettenbrink said that plaintiff would accept a return of the Custom Roof in exchange for a restocking fee of 35% of the purchase price, \$7,500. Mr. Mauldin sent an email to the project's architect the same day confirming the alleged statement by plaintiff that it would accept a return of the Custom Roof for the restocking fee. On 19 December 2007, plaintiff sent M&M a past-due invoice asking for full payment. On 20 December 2007, Mr. Mauldin sent an email to the project's architect informing the architect that a cheaper substitute insulation would be installed on the project instead of the Custom Roof.

On 21 December 2007, Mr. Mauldin spoke again with Mr. Mettenbrink and one of plaintiff's customer service managers, Dean Quinn. During this phone call, Mr. Mauldin claimed that Mr. Mettenbrink and Mr. Quinn said that M&M should "consider making alterations" in order to allow the Custom Roof to be used on the project.

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Mr. Mauldin claimed again after the conversation that Mr. Mettenbrink said that plaintiff would accept a return of the Custom Roof for payment of a 35% restocking fee plus the cost of freight. M&M's president and superintendent were present during this phone exchange; however, no corporate officers from plaintiff were also on the phone. Later the same day, M&M ordered a substitute insulation system from Bay Insulation of North Carolina, Inc., for \$10,233.39.

At 10:00 p.m. on 21 December 2007, Mr. Mauldin sent a fax to Mr. Mettenbrink stating: "We [at] M&M Builders, Inc.[.] have decided to use another product from a local supplier. You need to make arrangements to pick up your material [at] the site." This communication was the first from M&M stating affirmatively to plaintiff that M&M would actually be returning the Custom Roof. No part of the fax mentioned an oral agreement or a restocking fee.

In recalling the 17 and 21 December 2007 phone calls with Mr. Mauldin, Mr. Mettenbrink later stated in his affidavit:

5. On December 21, 2007, I had a telephone conference with representatives of M&M to discuss the Simple Saver Roof System with R30 Insulation, the Simple Saver Wall System with R19 Insulation and related goods that had been delivered to them. At no time during that conversation, nor at any other time, did I agree that [plaintiff] would accept a return of the custom fabricated goods. Moreover, I am not authorized to make an agreement to accept return of the custom fabricated goods, as all changes to credit sale contracts must be in writing and signed by an officer of [plaintiff].

Mr. Quinn similarly denied after the phone call that any agreement had been reached regarding a return of the Custom Roof on any terms.

Over the Christmas and New Year's holiday season, no communication between the parties took place. On 4 January 2008, Mr. Mauldin sent Mr. Mettenbrink another fax:

We [at] M&M Builders, Inc.[.] did not mean to insult your company in any way. The 12/21/07 fax was sent to your company with back-up per our fax machine. You stated that no trucking would be performed until after the first of the year. Our steel erector worked the week of Christmas and needed material that week. Per conversation w/architect for project e-mail, etc.[.] we were able to make the change with your 35% re-stocking charge [at] no cost to the owner.

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The 4 January 2008 fax also asked plaintiff again to come and retrieve “your material.” No part of the fax references an oral agreement under which plaintiff agreed to accept a return of the Custom Roof.

Mr. Mauldin sent another fax on 7 January 2008 to Mr. Mettenbrink asking that plaintiff come and retrieve the Custom Roof from the project site. In the fax, Mr. Mauldin stated:

Our steel erector did not bid the project as a retrofit; therefore, *we concluded* late December 21, 2007[,], that it was best to install another system, which was approved by the Architect. The Architect for the project has an email where you stated a re-stocking fee would be *involved* if the material was to be returned.

In conclusion, your material has to be picked up at the site as soon as possible. The material is in a tractor trailer that needs to be returned and your material is in the way. Finally, let us know when you will be at the site to pick up your material.

(Emphasis added.) Like the 4 January 2008 fax, this fax also failed to mention that there was an agreement for plaintiff to accept a return of the Custom Roof.

On 15 January 2008, Daniel Harkins, plaintiff’s vice president, visited the project site. After inspecting the site, looking at the Custom Roof, and talking with M&M about why it did not want to use plaintiff’s product, Mr. Harkins came to believe that M&M had no valid reason for making its substitution. Mr. Harkins sent Mr. Mauldin a letter dated 28 January 2008 rejecting a return of the Custom Roof. Mr. Harkins further stated in the letter that plaintiff would attempt to mitigate damages by: (1) talking to the architect for the Allen Jay Recreation Center project in an effort to persuade the architect to use the Custom Roof instead of the substitute; and (2) attempting to find another project for which the Custom Roof could be used.

In a letter dated 11 February 2008, Mr. Harkins again denied M&M’s claims that an oral agreement was reached regarding a return of the Custom Roof and offered M&M an alternative. Mr. Harkins explained that a project in Florida could use the Custom Roof, and that if M&M would pay a 35% restocking fee, 50% of the revised purchase order amount, and the cost of shipment, then plaintiff would credit M&M’s account approximately \$10,000. The remainder of M&M’s account would remain overdue for the full purchase price, \$18,556.25, plus interest, but Mr. Harkins explained that the credit would cover as much of this amount as possible.

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Mr. Mauldin sent Mr. Harkins a letter dated 15 February 2008 declining this offer. The same day, M&M tendered to plaintiff a check for \$6,494.69, which represented 35% of the revised invoice price for the Custom Roof. Mr. Harkins declined to accept the check and stated in a letter that plaintiff would be filing suit to recover the full amount under the Contract. Mr. Harkins further wrote that the Custom Roof should remain in M&M's possession.

On 23 September 2008, plaintiff filed the current action alleging claims for breach of contract and unjust enrichment. On 18 June 2009, plaintiff filed a motion for summary judgment. The trial court granted plaintiff's motion on 9 July 2009 and awarded plaintiff: (1) \$18,556.25, plus interest and (2) attorneys' fees in the amount of \$2,783.44. Defendants filed a timely notice of appeal to this Court on 4 August 2009.

II. ANALYSIS**A. Jurisdiction and Standard of Review**

The trial court's order awarding summary judgment to plaintiff is a final order, and jurisdiction in this Court is proper pursuant to N.C. Gen. Stat. § 7A-27(b) (2009). "We review orders granting summary judgment *de novo*." *Self v. Yelton*, 201 N.C. App. 653, 658, 688 S.E.2d 34, 37 (2010). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *In re Appeal of the Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003).

Summary judgment is proper when, viewed in the light most favorable to the non-movant, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.R. Civ. P. 56(c) (2010); *see S.B. Simmons Landscaping & Excavating, Inc. v. Boggs*, 192 N.C. App. 155, 163-64, 665 S.E.2d 147, 152 (2008). The party moving for summary judgment has the burden of showing that there is no genuine issue of material fact for trial. *Self*, 201 N.C. App. at 658, 688 S.E.2d at 38. "If a moving party shows that no genuine issue of material fact exists for trial, the burden shifts to the nonmovant to adduce specific facts establishing a triable issue." *Id.*

B. The Oral Agreement

[1] Defendants argue that there exists a genuine issue of material fact as to whether the parties are bound by the terms of the Contract, because

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a substitute oral agreement was reached between Mr. Mauldin and Mr. Mettenbrink regarding a return of the Custom Roof for a restocking fee. Specifically, defendants argue that the 21 December 2007 phone conversation resulted in either: (1) a new contract for a return of the Custom Roof; (2) an oral modification to the Contract's terms and conditions; or (3) a waiver of the terms and conditions of the Contract. We disagree.

Regarding defendants' first two arguments, there are two hurdles: the terms of the Contract and the statute of frauds in the Uniform Commercial Code ("UCC"). We address each in turn.

In the credit application and agreement, the parties' Contract states in part:

This agreement is a continuing general credit contract and shall remain in effect and be non-cancellable for any charges and interest incurred under this agreement until they are paid in full. The terms of this agreement shall not be altered except with written authorization of a corporate officer of Thermal Design[,] Inc.

Under these terms and conditions, when M&M purchased the Custom Roof from plaintiff, the agreement remained in effect for the duration of the charge on M&M's credit account. Until the credit account was paid in full, any changes to the terms of the Contract needed to be executed in writing by one of plaintiff's corporate officers.

Looking at the plain language of this part of the Contract, M&M's attempt to return the Custom Roof for a restocking fee clearly concerns a charge on the credit account. In essence, M&M sought to rescind its charge on the account in exchange for a return of the Custom Roof and the payment of a restocking fee. This type of agreement, to be enforceable under the terms of the credit application, would need to be negotiated with one of plaintiff's corporate officers and reduced to writing. As defendants concede, this was not done through Mr. Mauldin's phone conversation with Mr. Mettenbrink, because Mr. Mettenbrink was not a corporate officer with plaintiff. Moreover, no writing was signed by one of plaintiff's corporate officers. Thus, any alleged oral agreement Mr. Mauldin may have reached with Mr. Mettenbrink on 21 December 2007 was entirely unenforceable pursuant to the terms of the Contract.

With respect to the statute of frauds, defendants seek to enforce the alleged oral agreement with Mr. Mettenbrink through an excep-

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tion in N.C. Gen. Stat. § 25-2-201 (2009).² The UCC's statute of frauds, as a general rule, requires contracts for the sale of goods over \$500 to be in writing. N.C.G.S. § 25-2-201(1). However, defendants argue that because this transaction took place between merchants,³ an exception contained in section 25-2-201(2) applies:

Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received.

N.C.G.S. § 25-2-201(2). Defendants argue that no objection was raised by plaintiff within ten days of Mr. Mauldin's fax on 4 January 2008, and therefore, an enforceable agreement was reached for a return of the Custom Roof to plaintiff in exchange for the restocking fee.

Any supposed oral agreement reached on 21 December 2007 between plaintiff and M&M would need to meet the requirements of the statute of frauds in section 25-2-201(1). N.C. Gen. Stat. § 25-2-209(2)-(3) (2009); see 2A Lary Lawrence *Lawrence's Anderson on the Uniform Commercial Code* § 2-209:90 (2008) [Lawrence] ("The exceptions to the statute of frauds that are applicable to an original contract also apply to a modification."). Therefore, in order for the confirming memorandum, the 4 January 2008 fax, to satisfy the merchant's exception in section 25-2-201(2) as defendants contend, three elements are necessary: (1) "it must evidence a contract for the sale of goods"; (2) "it must be 'signed' "; and (3) "it must specify a quantity." N.C.G.S. § 25-2-201 official cmt. 1; 2 *Lawrence* § 2-201:226 ("The sufficiency of a confirmatory writing for purposes of UCC § 2-201(2) is governed by the same principles as control the sufficiency of a writing under UCC § 2-201(1)."); see also *Merritt-Campbell, Inc. v. RxP Prods., Inc.*, 164 F.3d 957, 962 (5th Cir. 1999) ("[T]he only term that must appear in a writing to support an enforceable contract for the sale of goods is the quantity term.").

2. The transaction in issue between the parties clearly concerns the sale of "goods," and we therefore apply the UCC to this case. N.C. Gen. Stat. §§ 25-2-102, -105 (2009).

3. The parties do not dispute that they are both merchants in this case. Therefore, for purposes of this analysis, we assume that both plaintiff and M&M are merchants under the UCC. See, e.g., *C. R. Fedrick, Inc. v. Borg-Warner Corp.*, 552 F.2d 852 (9th Cir. 1977) (contractor of construction project and equipment supplier held both to be merchants under the UCC in sale of pumps to contractor by supplier) (applying California law).

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In this case, the 4 January 2008 fax lacks the first and third elements. In the fax, Mr. Mauldin asks plaintiff to arrange “pick-up for your material”; however, Mr. Mauldin does not mention the prior existence of an agreement to do so, nor does he ascribe a quantity of the “material” to be returned at plaintiff’s expense. With respect to the first element in particular, in order to “evidence a contract for the sale of goods” under the merchant’s exception in section 25-2-201, the confirming memorandum must be “sufficient against the sender.” N.C.G.S. § 25-2-201(2). This means that the language in the 4 January 2008 fax needed to contain at least some sort of expression evidencing that defendant had already *agreed* to be bound in a prior oral exchange. The 4 January 2008 fax offered by defendant lacks any expression of this type, and instead the fax shows that defendant was still in the process of attempting to persuade plaintiff to accept a return of the Custom Roof in exchange for the restocking fee. Moreover, the subsequent fax on 7 January 2008, though not argued by defendant to be a confirming memorandum, is similarly void of any expression indicating plaintiff’s intent to be bound.

As to the third element regarding quantity, the revised purchase order included specific quantities of material: 14,387 square feet of Simple Saver Roof System with R30 insulation, 4,487 square feet of Simple Saver Wall System with R19 insulation, 5 boxes of Fast R Wall insulation hangers, and 1,900 feet of Thermal Break foam tape. Though the 4 January 2008 fax mentions the 35% restocking fee, the fax provides no quantity of the above-mentioned materials to be returned. A quantity term in a confirmatory writing need not be specific, and if defendant had indicated in the writing that it wished to return “all” of the Custom Roof, this may well have been sufficient. *See, e.g., Matter of Estate of Frost*, 130 Mich. App. 556, 344 N.W.2d 331 (1984) (term “all wood sawable” sufficient to supply quantity term). The memorandum at issue here, however, offers no definite term at all, and thus it is insufficient to satisfy the statute of frauds.

In light of the foregoing, we can ascertain no genuine issue of material fact showing that the alleged oral agreement reached on 21 December 2007 resulted in either (1) a modification to the Contract or (2) a new contract between the parties for return of the Custom Roof. The Contract expressly forbids such oral agreements, and defendants have failed to satisfy the UCC’s statute of frauds. This conclusion, however, does not end our analysis, because defendant further contends that, even if the oral agreement reached on 21 December 2007 is unenforceable, then the oral agreement nevertheless acted as a waiver of the terms and conditions of the Contract between the parties.

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Under the UCC, a party may waive the protection afforded by the statute of frauds by later conduct even though a written agreement has been executed. Section 25-2-209 of our General Statutes provides:

(2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.

(3) The requirements of the statute of frauds section of this article (G.S. 25-2-201) must be satisfied if the contract as modified is within its provisions.

(4) *Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.*

(5) *A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.*

N.C.G.S. § 25-2-209(2)-(4) (emphasis added).

Here, again, the terms of the Contract defeat defendants' argument that there was a waiver. In order for a waiver to occur in this case, the attempted modification or rescission would need to be negotiated by one of plaintiff's corporate officers. Since neither Mr. Mettenbrink nor Mr. Quinn are corporate officers with plaintiff, they did not have any authority to waive the provisions of the Contract. As a result, there could not have been an attempted modification or rescission pursuant to the parties' Contract.

Moreover, this Court has held that a waiver under section 25-2-209 requires more than a mere promise. *Varnell v. Henry M. Milgrom, Inc.*, 78 N.C. App. 451, 455, 337 S.E.2d 616, 619 (1985). Instead, a party asserting waiver must demonstrate, in addition to a promise made by the waiving party, either: (1) additional consideration; (2) material change in position by the promisee based on the alleged oral contract; or (3) conduct on the part of the party offering the statute of frauds as a defense sufficient to show that an oral agreement was reached. *Id.*

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In this case, defendants argue only that they materially changed position based on the conversation occurring on 21 December 2007. This argument, however, is without merit given that Mr. Mauldin informed the project's architect on 20 December 2007 that a substitute roofing system would be used on the Allen Jay project, the day before the alleged oral agreement was reached with Mr. Mettenbrink. Given that the decision to use a substitute system was made before the oral agreement was allegedly reached, defendants cannot now maintain that they materially changed position based on the phone conversation on 21 December 2007.⁴

Our review of the record shows that there is no genuine issue of material fact as to whether the conversation on 21 December 2007 resulted in either a new contract, a modification, or a waiver of the parties' original Contract. Even viewing the evidence in the light most favorable to defendants, the trial court correctly concluded that plaintiff was entitled to judgment as a matter of law. This assignment of error is overruled.

C. Mitigation of Damages

[2] Defendants argue that there is a genuine issue of material fact as to whether plaintiff took reasonable steps to mitigate its damages. We disagree. The duty placed on an injured party to mitigate its damages is well established.

“In an action for tort committed or breach of contract without excuse, it is a well settled rule of law that the party who is wronged is required to use due care to minimize the loss. . . . The burden is on defendant of showing mitigation of damages.” Therefore, while the duty is imposed upon the injured party to use ordinary care and prudence to minimize his damages, nevertheless the burden is upon the injuring party to offer evidence tending to show such breach of duty or failure to exercise the requisite degree of care and prudence to reduce and minimize the loss complained of.

Distributing Corp. v. Seawell, 205 N.C. 359, 360, 171 S.E. 354, 355 (1933).

4. Based on this observation of the record, we decline to address the portion of defendants' brief regarding promissory estoppel. Assuming, without deciding, that promissory estoppel may be used as a defense by defendants, one of the elements is detrimental reliance. *Wachovia Bank v. Rubish*, 306 N.C. 417, 427, 293 S.E.2d 749, 756 (1982). Since the decision to substitute the Custom Roof was made before the alleged oral promise by plaintiff, detrimental reliance cannot be established.

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Here, Mr. Mauldin's fax sent at 10:00 p.m. on 21 December 2007 was the first communication to plaintiff that M&M intended to return the Custom Roof, which was specially ordered and manufactured for the Allen Jay project. After this initial fax, Mr. Mauldin sent two other faxes following the December and January holiday season concerning a return of the Custom Roof. On 15 January 2008, plaintiff's vice president visited the project site, and on 28 January 2008 sent Mr. Mauldin a letter explaining two ways in which plaintiff would attempt to mitigate the damages: (1) talk to the architect and (2) attempt to find another project. In a letter dated 11 February 2008, plaintiff's vice president sent M&M a letter explaining a way in which a credit could be applied to M&M's account by sending the Custom Roof to another project in Florida. M&M declined to accept the offer, and the Custom Roof remained at the Allen Jay project site until the initiation of this suit.

These facts show that plaintiff found a potential replacement project for the specially manufactured Custom Roof approximately seven weeks after defendant first informed plaintiff that it intended to return the Custom Roof. Had M&M accepted plaintiff's offer and paid for the freight, approximately \$10,000 could potentially have been recovered to apply to M&M's delinquent credit account. Plaintiff offered this opportunity to M&M despite the fact that plaintiff was in the process of providing a new roofing and insulation system to the Florida project, which would have resulted in a lost volume sale⁵ to plaintiff. It was only after M&M refused plaintiff's offer that plaintiff manufactured and provided a new roofing system to the project in Florida.

The only evidence offered by defendants to show that there is a genuine issue of material fact that plaintiff did not use due care in mitigating its damages is a letter from Mr. Harkins dated 29 February 2008. Defendants' reliance on this letter, however, is misplaced in light of the above facts. In the 29 February 2008 letter, Mr. Harkin explains at length that plaintiff intended to file suit to recover the full price of the contract, in part because M&M refused to ship the Custom Roof to the project in Florida. No portion of the letter evidences an intent on plaintiff's behalf to increase their damages by failing at their duty to mitigate. To the contrary, the letter recites a lengthy explanation as to how plaintiff had attempted to use the Custom Roof on another project and M&M had refused the offer.

5. N.C. Gen. Stat. § 25-2-708(2) (2009).

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Given that M&M had already accepted the specially manufactured Custom Roof and kept it on the jobsite for over six weeks before attempting to return it, we conclude that the above actions by plaintiff satisfied its burden of due care to mitigate its damages. The evidence offered by defendants does not create a genuine issue of material fact, and accordingly, plaintiff was entitled to judgment as a matter of law on this issue. This assignment of error is overruled.

III. CONCLUSION

Based on the foregoing, the order of the trial court is

Affirmed.

Judges STEPHENS and ERVIN concur.

STATE OF NORTH CAROLINA v. JAMES WILLIAM EFFLER

No. COA10-53

(Filed 7 September 2010)

1. Homicide— voluntary manslaughter—jury instruction—defendant as the aggressor

The trial court did not commit plain error when it instructed the jury that it could find defendant guilty of voluntary manslaughter if the jury found that defendant was the aggressor as there was sufficient evidence in the record of defendant being the aggressor.

2. Homicide— voluntary manslaughter—jury instruction—no duty to retreat—no plain error

The trial court did not commit plain error in a murder trial by failing to instruct the jury *ex mero motu* that defendant had no duty to retreat in the curtilage of his home. While the trial court's failure to include the instruction was erroneous, the jury would have reached the same verdict even if the jury had been instructed that defendant did not have a duty to retreat.

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**3. Homicide— voluntary manslaughter—sufficient evidence—
no error**

The trial court did not err by denying defendant's motion to dismiss the charge of voluntary manslaughter because the State presented sufficient evidence that defendant was the aggressor and that defendant used excessive force.

Appeal by defendant from judgment entered 14 September 2009 by Judge Bradley B. Letts in McDowell County Superior Court. Heard in the Court of Appeals 26 May 2010.

Attorney General Roy Cooper, by Special Deputy Attorney General James A. Wellons, for the State.

Winifred H. Dillon for defendant appellant.

HUNTER, JR., Robert N., Judge.

James William Effler ("defendant") appeals as a matter of right from his conviction for voluntary manslaughter. On appeal, defendant argues: (1) that the trial court committed plain error when it instructed the jury that it could find defendant guilty of voluntary manslaughter if the jury found that defendant was the aggressor, where the record is void of any evidence that defendant was the aggressor; (2) that the trial court committed plain error when it failed to instruct the jury *ex mero motu* that defendant had no duty to retreat; and (3) that the trial court erred by denying defendant's motion to dismiss because the State failed to present sufficient evidence that defendant was the aggressor or that defendant used excessive force. After review, we hold that the trial court's instructions to the jury did not constitute plain error, and that sufficient evidence was presented that defendant was the aggressor and/or used excessive force. As such, we find no error.

I. Factual and Procedural Background

On 7 September 2009, defendant was tried before a jury on an indictment charging him with first-degree murder in McDowell County Superior Court. Defendant entered a plea of not guilty.

At trial, the State's evidence tended to show the following: Defendant lived in a camper parked on his mother's property beside her home. Defendant shared the camper with his girlfriend and several of his displaced acquaintances. The victim, Dan Michael Brown ("Brown"), had been a close friend of defendant for over fifteen years. Prior to his death, Brown had been living with defendant for

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several months due to strained family relations and a recent breakup with his girlfriend. Both defendant and his mother voiced concerns that Brown needed to seek alternate living arrangements and find employment. Defendant also complained that the individuals in his home needed to leave because they were not assisting him financially.

On the morning of 27 November 2007, Thomas Thompson (“Thompson”), defendant’s employer, arrived at defendant’s residence to transport defendant, Wayne Elliott, and Tim Edwards to the jobsite where they had been working. Thompson allowed defendant to drive his 1990 Ford Explorer, because defendant knew a shorter route to the jobsite. Before leaving, defendant left Brown a note informing Brown that he would need to find somewhere else to stay, or find a job to assist defendant and his mother financially.

Approximately twenty minutes after defendant left for work Brown read defendant’s note and became extremely agitated. Brown and Destini Rhodes (“Rhodes”), defendant’s girlfriend, argued briefly, leaving Rhodes upset and crying. Rhodes exited the camper and began to call defendant repeatedly in an effort to get defendant to return to the camper and address Brown. Rhodes told defendant that she was not comfortable staying in the camper with Brown. Defendant instructed Rhodes to take her belongings and a baseball bat into his mother’s home.

After speaking with Rhodes, defendant aborted his trip to the jobsite and drove back to his residence. Thompson testified that defendant appeared worried and upset, and that defendant turned the car around very erratically. Defendant’s speed and erratic driving prompted Thompson to tell defendant to “ease up on the car because it was already in bad shape.” At trial, Thompson said that it took five or six minutes to get back to defendant’s camper, while Elliott testified that it took approximately thirty to forty-five minutes.

After arriving at his residence, defendant exited the vehicle and threw Brown’s tools in the yard. Elliott testified that defendant said, “here’s your g-d tools if that’s what you want” as he threw Brown’s tools. Brown then came running from behind the camper with a baseball bat. Defendant reentered the driver’s side of the vehicle. Elliott further testified that defendant placed the vehicle in reverse and “flooded it,” but the Explorer only traveled six to ten feet before defendant slammed on the brakes. Multiple witnesses, including Elliott, Thompson, Rhodes, and Edward testified that they observed Brown attempting to hit the vehicle’s windshield and poke defendant

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through an open window with the baseball bat. After Brown approached the vehicle, he was disarmed.

Sheriff Dudley Greene of the McDowell County Sheriff's Office testified that defendant, after being advised of his *Miranda* rights, stated that the following occurred. Defendant and Thompson exited the vehicle. Defendant attempted to take the baseball bat away from Brown; however, defendant said that he was unsure of who ultimately took the baseball bat away. At some point after Brown relinquished the bat, defendant stated that he stabbed Brown during the fight.

Rhodes and Edwards also testified at trial that defendant and Thompson attempted and succeeded in disarming Brown after exiting the vehicle. Thompson testified that he exited the vehicle and asked Brown to give him the bat, which Brown relinquished without struggle. However, Elliott testified that as Brown attempted to poke defendant, defendant grabbed the bat and pulled it inside the vehicle.

After exiting the vehicle, defendant began a fistfight with Brown in a field next to defendant's mother's home. During the fistfight, defendant grabbed the bat. Edwards testified that he observed defendant strike Brown in the legs with the baseball bat. Moreover, Thompson and Elliott testified that they observed defendant yelling at Brown throughout the fight. Elliott specifically testified that he saw defendant standing over Brown with the baseball bat yelling, "you should have just went—I told you to go the 'F' home. You should have just went home." Thompson's testimony supported that of Elliott and indicated that Thompson saw defendant standing over Brown screaming, "if he didn't stop he would double or triple his skull with it" (the baseball bat). Thompson further testified that he understood the statement to be an expression of anger.

As the fight progressed, Elliott testified that he yelled to defendant "that [Brown] had had enough." Elliott said that he tackled defendant in an attempt to pull defendant off Brown. Edwards also testified that he observed Elliott trying to restrain defendant and heard Elliott yelling at defendant to "quit, stop it." The fight ended with Brown lying on the ground. After the altercation ended, defendant, Edwards, Elliott, and Thompson reentered the vehicle and went to the jobsite. The bat and knife used in the fight were abandoned in close proximity to defendant's work site; however, both objects were later retrieved by the authorities. Defendant later admitted to Sheriff Greene that he disposed of the knife.

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Rhodes called law enforcement and emergency personnel to assist Brown who was injured and lying in the yard. According to Rhodes, before he left the scene, defendant told her to tell police that black men had injured Brown. Rhodes complied with defendant's request by informing police that three black men in a Dodge Neon had assaulted Brown, but stated that she did not know why. After law enforcement officials discovered Rhodes was not being truthful, she informed them that she had fabricated the story. Sheriff Greene testified that defendant gave a statement that he tried to calm Brown down and then stabbed him in the side and in the shoulder blade area of his back. Defendant did not tell Sheriff Greene why he stabbed Brown, and did not indicate that the stabbing was done in self-defense. Moreover, at trial, Edwards testified that when he asked defendant if defendant had cut Brown with a knife, defendant told Edwards that he poked or cut Brown to get him off him.

Brown was declared dead after being transported to the hospital. Dr. Patrick Eugene Lantz performed Brown's autopsy. During the autopsy, Dr. Lantz noted that Brown had been stabbed in the chest and in the back. Dr. Lantz testified at trial that the stab wound to the chest area "went into the heart muscle to a depth, from the skin surface down to the heart." The immediate cause of Brown's death was determined to be acute loss of blood.

Defendant did not put on any evidence or testify at trial. At the close of the evidence, the trial court granted defendant's motion to dismiss the charge of first-degree murder. The case was submitted to the jury on the following possible verdicts: (1) guilty of second-degree murder; (2) guilty of voluntary manslaughter; and (3) not guilty.

On 14 September 2009, defendant was convicted of voluntary manslaughter. The court sentenced defendant to 92 to 120 months' imprisonment. Defendant gave notice of appeal in open court.

II. Jury Instructions

Defendant's first and second assignments of error assert that the trial court committed plain error by instructing the jury on the aggressor element and by failing to include instructions on the duty not to retreat. We disagree and conclude that the trial court did not commit plain error in so instructing the jury.

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The trial court instructed jurors as follows:

The defendant would not be guilty of any murder or manslaughter if he acted in self-defense as I have just defined it to be and if he was not the aggressor in bringing on the fight and did not use excessive force under the circumstances.

If the defendant voluntarily and without provocation entered the fight, he would be considered the aggressor unless he thereafter attempted to abandon the fight and gave notice to the deceased that he was doing so.

One enters the fight voluntarily if he uses toward his opponent abusive language, which, considering all of the circumstances is calculated and intended to bring on a fight. The defendant uses excessive force if he uses more force than reasonably appeared to him to be necessary at the time of the killing.

At the charge conference the presiding judge also noted areas of interest that both the State and defense should review.

THE COURT: And then the only other area that I think that you might want to . . . review is, if you are looking at the pattern instruction . . . [i]t just says: If you find beyond a reasonable doubt that on or about the alleged date the defendant intentionally wounded the victim with a deadly weapon and that the defendant was the aggressor—and then I said—was the aggressor or used excessive force.

A. Standard of Review

Defendant's failure to make a timely objection to the jury instructions requires this Court to review defendant's assignments of error under the plain error rule. *See State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). "The plain error rule applies only in truly exceptional cases." *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986). To find plain error this Court must review the entire record and "must be convinced that absent the error the jury probably would have reached a different verdict . . . that the error in question 'tilted the scales' and caused the jury to reach its verdict convicting the defendant." *Id.* at 39, 340 S.E.2d at 82 (citation omitted); *see also Odom*, 307 N.C. at 655, 300 S.E.2d at 378 (explaining plain error).

Moreover, our Supreme Court has held that, "[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *Odom*,

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307 N.C. at 661, 300 S.E.2d at 378 (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L. Ed. 2d 203, 212, (1977)).

B. Defendant as Aggressor

[1] Defendant first contends that the trial court committed plain error by instructing the jury that a defendant acting in self-defense is guilty of voluntary manslaughter if he was the aggressor in bringing on the fight, where the record contains no evidence that defendant was the aggressor. See *State v. Temples*, 74 N.C. App. 106, 109, 327 S.E.2d 266, 268 (1985). However, there is sufficient evidence in the record to suggest that defendant was indeed the aggressor, warranting the given instruction. As such, we conclude there was no error.

This State has consistently held that a killing may be entirely excused if, at the time of the killing, the following four elements are present:

(1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and

(2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and

(3) defendant was not the aggressor in bringing on the affray, *i.e.*, he did not aggressively and willingly enter into the fight without legal excuse or provocation; and

(4) defendant did not use excessive force, *i.e.*, did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

State v. Norris, 303 N.C. 526, 530, 279 S.E.2d 570, 572-73 (1981). A defendant is guilty of at least voluntary manslaughter if he was the aggressor or used excessive force in the affray. *Id.* An individual is the aggressor if he " 'aggressively and willingly enters into a fight without legal excuse or provocation.' " *State v. Potter*, 295 N.C. 126, 144, 244 S.E.2d 397, 409 (1978) (quoting *State v. Wynn*, 278 N.C. 513, 519, 180 S.E.2d 135, 139 (1971)). "A person is considered to be an aggressor . . . when he has 'provoked a present difficulty by language or conduct towards another that is calculated and intended to bring it about.' " *Potter*, 295 N.C. at 144 n.2, 397 S.E.2d at 409 n.2.

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The evidence presented at trial establishes that defendant was the aggressor. All relevant testimony tends to show that Brown did not initiate the altercation. Brown emerged from behind defendant's trailer only after defendant threw Brown's tools into the yard along with expletive-laden remarks. Furthermore, in his brief defendant concedes that the act of throwing the tools in the yard could be construed by a reasonable jury as an act of provocation.

It is undisputed that "[a] person is entitled under the law of self-defense to harm another only if he is 'without fault in provoking, engaging in, or continuing a difficulty with another.'" *State v. Stone*, 104 N.C. App. 448, 451-52, 409 S.E.2d 719, 721 (1991) (quoting *State v. Hunter*, 315 N.C. 371, 374, 338 S.E.2d 99, 102 (1986) (citation omitted)). It is evident from the record that attempts were made to restrain defendant from continuing the altercation with Brown. Defendant discontinued the affray with Brown only after he had stabbed Brown who was unarmed. Additionally, defendant was also heard screaming expletives at Brown and seen standing over Brown with a baseball bat during the affray.

Sufficient evidence was presented for a reasonable jury to conclude that defendant was the aggressor and the trial court's instruction to the jury was not in error.

Moreover, absent the alleged error it is not probable that the jury would have reached a different verdict, as there is evidence that defendant used excessive force. *See Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (defining plain error). All relevant testimony indicates that Brown was unarmed when he was stabbed by defendant. Additionally, attempts were made to restrain defendant and get him off Brown. Defendant stated that he stabbed Brown, who was unarmed, in an effort to calm him down. The evidence clearly demonstrates that defendant used excessive force in the altercation when he stabbed Brown.

Therefore, we hold that the trial court did not commit error, much less plain error, in instructing the jury on the aggressor requirement.

C. Duty Not to Retreat

[2] Defendant next contends that the trial court committed plain error when it failed to instruct the jury *ex mero motu* that defendant had no duty to retreat. While the trial court's failure to include the instruction on no duty to retreat was erroneous, it was not plain error.

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Our Court has held that “[w]here the defendant’s or the State’s evidence when viewed in the light most favorable to the defendant discloses facts which are “legally sufficient” to constitute a defense to the charged crime, the trial court must instruct the jury on the defense.” *State v. Beal*, 181 N.C. App. 100, 102, 638 S.E.2d 541, 543 (2007) (citation omitted). Ordinarily, a person is not required to retreat when assaulted in his dwelling or within the curtilage thereof, “whether the assailant be an intruder or another lawful occupant of the premises.” *Id.* at 102-03, 638 S.E.2d at 543-44 (quoting *State v. Browning*, 28 N.C. App. 376, 379, 221 S.E.2d 375, 377 (1976)). While the State does not contend that the trial court should have included the instruction that defendant had no duty to retreat (N.C.P.I., Crim. 308.10) in his charge to the jury, even absent a timely request from defendant, its omission was not plain error.

Defendant’s second contention is much like that of the defendant in *State v. Morgan*, 315 N.C. 626, 340 S.E.2d 84 (1986). In *Morgan*, the defendant sought reversal of his first-degree murder conviction on the ground that the trial court committed plain error by failing to instruct the jury that the defendant was not obligated to retreat because he was at his place of business. *Id.* at 641, 340 S.E.2d at 94. Not unlike the defendant in *Morgan*, defendant Effler failed to submit a request for special jury instructions “to the effect that he had the right to stand his ground and repel force with force in his own home [or curtilage] if he were found not to be the aggressor.” *Id.* at 642, 340 S.E.2d at 94. In that case, the North Carolina Supreme Court held that the failure to give the instruction did not constitute plain error.

The Court recognized that “[i]t has . . . been held that where supported by the evidence in a claim of self-defense, an instruction negating defendant’s duty to retreat in his home or premises must be given even in the absence of a request by defendant.” *Id.* at 643, 340 S.E.2d at 95 (citing *State v. Poplin*, 238 N.C. 728, 78 S.E.2d 777 (1953)); *State v. Ward*, 26 N.C. App. 159, 215 S.E.2d 394 (1975). However, review of the whole record failed to convince the Court “that absent the error, the jury probably would have reached a different verdict.” *Morgan*, 315 N.C. at 647, 340 S.E.2d at 97. Accordingly, the Court held that “the defendant [had] not carried his burden of showing ‘plain error.’ ” *Id.*; see also *State v. Lilley*, 318 N.C. 390, 348 S.E.2d 788 (1986).

The pattern jury instruction on the issue of retreat reads as follows:

If the defendant was not the aggressor and the defendant was [in the defendant’s own home] [or] [on the defendant’s

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own premises] [at the defendant's place of business] the defendant could stand the defendant's ground and repel force with force regardless of the character of the assault being made upon the defendant. However, the defendant would not be excused if the defendant used excessive force.

N.C.P.I., Crim. 308.10 (2009) (footnote omitted).

The duty not to retreat in one's own home or premises is predicated upon the absence of use of excessive force. *See State v. McCombs*, 297 N.C. 151, 253 S.E.2d 906 (1979). The instructions provided in the instant case to the jury at trial explained that, if defendant was found to have used excessive force, he would not be afforded the right to perfect self-defense and would be guilty of at least voluntary manslaughter. Moreover, the instruction requested by defendant also indicates that defendant would not be excused of the killing if he used excessive force. As previously discussed, it was reasonable for the jury to conclude that defendant used excessive force. Additionally, there was sufficient evidence for the jury to determine that defendant was the aggressor in the affray. Neither the instruction given at trial, nor the instruction sought by defendant on appeal, excuse defendant if he used excessive force or was the aggressor in the affray. As such, defendant has not shown that the jury would have reached a different verdict absent the trial court's refusal to instruct on the duty not to retreat.

Defendant also cites *State v. Davis*, 177 N.C. App. 98, 627 S.E.2d 474 (2006), for support; however, that case is clearly distinguishable from the case at bar. In *Davis*, there was evidence to suggest that the failed instruction on duty not to retreat had a probable impact on the jury's finding of guilt. *Id.* at 101-03, 627 S.E.2d at 477-78. Testimony in that case tended to show that the defendant "returned fire only after [the victim] shot at him." *Id.* at 103, 628 S.E.2d at 478. The evidence presented tended to suggest that "defendant was not the initial aggressor and his right to stand his ground was at least a 'substantial feature' of his defense of self-defense." *Id.* The defendant in *Davis* was found guilty of second-degree murder. *Id.* Based on the record in *Davis*, the Court explained that "[w]ithout an instruction that defendant had the right to stand his ground when met with deadly force, the jury may have believed that defendant acted with malice, requiring it to return a verdict of guilty of second degree murder." *Id.* at 103, 628 S.E.2d at 478. As such, the Court in *Davis* held that the trial court's failure to instruct the jury that the defendant could be found not guilty by reason of self-defense in its final mandate was prejudicial error. *Id.* at 101-02, 628 S.E.2d at 477.

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Viewing the evidence in the present case, we conclude that the jury would have reached the same verdict if the jury was instructed that defendant did not have a duty to retreat in the curtilage of his home. We therefore hold that “defendant has not carried his burden of showing ‘plain error.’” *Hunter*, 315 N.C. at 647, 340 S.E.2d at 97 (citing *Walker*, 316 N.C. 33, 390 S.E.2d 80).

III. Motion to Dismiss

[3] Finally, defendant contends that the trial court erred by denying defendant’s motion to dismiss because the State failed to present sufficient evidence that defendant was the aggressor or that defendant used excessive force. We disagree.

Challenges to the sufficiency of the evidence must be viewed in the light most favorable to the State, “giving the State the benefit of all reasonable inferences.” *State v. Fritsch*, 351 N.C. 373, 378-79, 526 S.E.2d 451, 455 (2000) (citing *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). “Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve.” *Id.*

Defendant argues that the State failed to present sufficient evidence to prove that defendant was the aggressor, or that defendant used excessive force. However, as previously determined in this opinion, there is ample evidence by which the jury could conclude that defendant was the aggressor or used excessive force. Accordingly, we conclude there was no error.

IV. Conclusion

Based on the foregoing, we conclude that defendant received a fair trial free from error.

No error.

Judges STEELMAN and STEPHENS concur.

IN RE S.R. & N.R.

[207 N.C. App. 102 (2010)]

IN THE MATTER OF: S.R. AND N.R.

No. COA10-337

(Filed 7 September 2010)

1. Termination of Parental Rights— appointment of guardian ad litem for parent—no abuse of discretion

The trial court did not abuse its discretion by not appointing respondent mother a *guardian ad litem sua sponte* in a termination of parental rights proceeding. There was no allegation of dependency as a ground for termination, no allegation that respondent mother's substance abuse and mental health issues resulted in a diminished capacity or rendered her incompetent to participate in the proceedings, and nothing in the proceedings raised a question regarding respondent mother's competency.

2. Termination of Parental Rights— best interest of the juveniles—statutory factors considered—no abuse of discretion

The trial court did not abuse its discretion in terminating respondent mother's parental rights where evidence in the record indicated that the trial court considered all of the statutory factors under N.C.G.S. § 7B-1110(a) before determining that termination of parental rights was in the best interest of the juveniles.

Appeal by respondent mother from order dated 23 November 2009 by Judge Rickye McKoy-Mitchell in Mecklenburg County District Court. Heard in the Court of Appeals 16 August 2010.

Kathleen Arundell Widelski for petitioner-appellee Mecklenburg County Department of Social Services.

Parker Poe Adams & Bernstein, by Jennifer L. Ma, for guardian ad litem.

Charlotte Gail Blake for respondent-appellant mother.

BRYANT, Judge.

Where there were no allegations of dependency as a ground for termination, no allegation that respondent-mother's substance abuse and mental health issues resulted in a diminished capacity or rendered her incompetent to participate in the proceedings, and nothing in the proceedings raised a question regarding respondent-mother's competency, the trial court did not abuse its discretion by not appointing

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respondent-mother a guardian *ad litem sua sponte*. Further, where evidence in the record indicates that the trial court considered all of the statutory factors under N.C. Gen. Stat § 7B-1110(a) before determining that termination of parental rights was in the best interest of the juveniles, the trial court did not abuse its discretion.

Facts

This appeal concerns the termination of respondent-mother's parental rights to juveniles S.R. and N.R.¹ The juveniles have different fathers. Both fathers' parental rights were terminated in the trial court's order. Neither father appeals.

On 15 November 2006, the Mecklenburg County Department of Social Services, Youth and Family Services Division ("YFS"), filed a juvenile petition alleging that S.R. and N.R. were neglected and dependent juveniles. The petition alleged that YFS had been involved with respondent-mother and her children since 2004. In September 2006, YFS received a referral regarding respondent-mother's mental health needs, her lack of stable housing and employment, her substance abuse, and her inappropriate care of the children. YFS investigated the referral, and respondent-mother agreed to place the children with her father and stepmother—the children's maternal grandparents. However, on 13 November 2006, respondent-mother removed the children from the grandparents' home without notifying YFS. The petition further alleged several incidents in which respondent-mother failed to seek proper medical care for the children and failed to provide proper care and supervision for the children.

During the September investigation, respondent-mother admitted to YFS that she continued to use illegal drugs, and she was referred to the McLeod Center Intensive Outpatient Treatment Program. YFS alleged that respondent-mother continued to test positive while in the program and was dismissed from it on 8 November 2006. Lastly, the petition alleged that respondent-mother had been diagnosed with bipolar disorder but failed to take prescribed medication, had issues with controlling her anger, and lacked stable housing and employment.

According to the petition, S.R.'s father had been providing child support to respondent-mother. S.R.'s father admitted to being arrested in 1996 for selling drugs. At the time the petition was filed, N.R.'s paternity had not been established, but N.R.'s putative father lived in Mexico, had not maintained a relationship with N.R., and had

1. Initials have been used throughout to protect the identity of the juveniles.

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not provided financial assistance for the care of N.R. In a nonsecure custody order entered the same day, the trial court gave YFS custody of the children, and they were placed with respondent-mother's great-grandmother (the children's great-great-grandmother).

On 22 December 2006, YFS conducted a mediation with respondent-mother and S.R.'s father. By order dated 4 January 2007, the trial court adjudicated the children neglected and dependent, based on mediated agreements entered into by respondent-mother and S.R.'s father. N.R.'s paternity had still not been established at the time of the adjudication and the putative father did not participate in the proceedings. In the order, the trial court found that respondent-mother stipulated to the allegations contained in the mediated agreement, which mirrored the allegations contained in the juvenile petition.

On the same day, the trial court entered a separate disposition order, in which it concluded that the permanent plan for the children was reunification. The trial court kept the children in the custody of YFS and in the placement with respondent-mother's great-grandmother. The parents were awarded supervised visitation. Respondent-mother's case plan also required her to: (1) follow through with all recommendations that resulted from her F.I.R.S.T. (Families in Recovery to Stay Together) assessment; (2) complete substance abuse and alcohol abuse treatment and maintain sobriety on an ongoing basis; (3) complete a mental health assessment, following through with all recommendations, and take any prescribed medication; (4) complete a domestic violence assessment and follow through with all recommendations; (5) complete parenting classes; (6) obtain legal, stable employment; (7) maintain safe, stable, and appropriate housing for herself and the children; and (8) maintain regular contact with YFS social worker Brenda Burns.

The trial court held a permanency planning hearing on 2 and 3 October 2007 and entered a corresponding order on 30 November 2007. At this time, respondent-mother had not complied with any of the directives in her case plan, and the trial court made the following finding of fact:

The mother is diagnosed with Bipolar disorder. She missed a medication appointment in March 2007. YFS has no knowledge of the mother participating in therapeutic services. The mother has a history of substance abuse. She continued use of illegal substances while participating in substance abuse treatment. She was unsuccessfully discharged from treatment

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due to excessive absences. The mother is not currently engaged in substance abuse treatment. She testified that she is on a waiting list for treatment in Iredell County. The mother does not have independent housing.

Again, the trial court ordered respondent-mother to comply with her case plan. Based on the foregoing, the trial court suspended efforts to reunify the juveniles with the mother. However, the trial court declined to order termination of parental rights at that time.

At the permanency planning hearing, YFS requested that the children be removed from the placement with respondent-mother's great-grandmother on the grounds that the placement was no longer in the children's best interests. The trial court found that YFS had not provided sufficient information to establish that the children's placement was contrary to their best interests and therefore ordered the children to remain with the great-grandmother. At the next three permanency planning hearings, conducted on 31 January 2008, 24 April 2008, and 26 June 2008, the circumstances of the case had not changed. At the time of the fifth permanency planning hearing, held on 31 July 2008, circumstances surrounding the juveniles had started to decline, and the trial court changed the permanent plan to termination of parental rights and adoption, while maintaining a concurrent plan of legal guardianship with a relative. YFS was ordered to investigate possible relative placements. On 7 August 2008, S.R. and N.R. were removed from the great-grandmother's home and placed in a foster home.

In September 2008, YFS filed petitions to terminate all three parents' rights to S.R. and N.R. The trial court conducted a termination hearing on 16 and 17 March 2009, 22 May 2009, and 22 and 23 July 2009. The trial court heard testimony from YFS social worker Brenda Burns, S.R.'s therapist, Mariah Curran, Ph.D., and N.R.'s therapist, Lydia Duncan. Respondent-mother testified on her own behalf at the hearing and also called the great-grandmother as a witness. Following the hearing, the trial court entered an order on or about 23 November 2009 terminating all three parents' parental rights. In its order the trial made the following findings of fact, *inter alia*, regarding respondent-mother's failure to comply with her case plan:

12. As of the end of this trial on 23 July 2009, [respondent-mother] has not completed an intensive outpatient substance abuse treatment program. Her testimony was that she needed to complete a program at Anuvia in order to

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receive her driver's license, which she has never secured since her offense in Juvenile Court in 1998.

13. She intends to complete a substance abuse program at Anuvia, which is the same program as the Chemical Dependency Center, where she was enrolled in late 2006 and early 2007. Despite having over two and one half years to complete this program, [respondent-]mother has failed to do so. Substance abuse, the most important issue in her case plan, remains unaddressed.

...

16. At this trial, [respondent-]mother admitted she had not followed through with [mental health] counseling and was not taking her medication [for bipolar disorder]. She testified that she [had] been evaluated at a different mental health center in Rutherford County and had been given a different diagnosis.

17. But [respondent-mother] presented no proof she had been evaluated there and had received a different diagnosis. Because she failed to share this information with the court or her social worker prior to the last day of the trial, there was no way to verify this information or to determine if she [was] complying with the recommendations of those mental health professionals. The mother has failed to comply with the mental health components of her case plan.

...

20. While her children have been in custody for almost three years, the mother has reported on two brief periods of employment. She worked for a dry cleaner in Mooresville in 2007 and reported at a court hearing in 2008 that she was going to begin work at an Arby's restaurant.

21. At this trial, [respondent-mother] was still unemployed. She admitted she never actually had a job at Arby's.

...

23. . . . [Respondent-]mother does not have a suitable home for the children.

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24. Since November 2006, the mother has moved from Charlotte to Mooresville, to Rowan County, to Forest City and now back to Charlotte, where she is living with her great grandmother []. The mother has never resolved the issue of her unstable housing.
25. The mother has unresolved issues with anger control. At a visit in the past year, she bought a bag of candy for her children. When told she could not give the candy to the children, the mother threw the bag into a trash can in front of her children and left the visit.
26. More recently, the mother called the social worker and left an inappropriate message on the worker's voice mail box. Had the mother remained in therapy and in contact with her mental health professionals, this issue may have been resolved.

The trial court found the existence of the following grounds to terminate respondent-mother's parental rights: (1) neglect; (2) willfully leaving the juveniles in foster care for more than twelve months without showing reasonable progress to correct the conditions that led to removal; and (3) willfully failing to pay a reasonable portion of the cost of care for the juveniles. In several dispositional findings, the trial court outlined the children's placement history, as well as YFS's efforts to keep the children in a kinship placement. However, none of the potential placements were approved, and the trial court found that the children's foster parents were interested in adoption. The trial court then determined that it was in the children's best interests to terminate respondents' parental rights. From this order, respondent-mother appeals.

On appeal, respondent-mother contends the trial court abused its discretion by failing (I) to appoint a guardian ad litem for respondent-mother pursuant to N.C. Gen. Stat. § 7B-1101.1; and (II) to consider all of the factors set out in N.C. Gen. Stat. § 7B-1110. We note that respondent-mother does not challenge the trial court's conclusions that grounds existed to terminate her parental rights to S.R. and N.R. Nor does she make any other challenges to the adjudicatory stage of the termination proceedings. Therefore, the trial court's adjudication of grounds for terminating respondent-mother's parental rights is binding on appeal.

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I

[1] Respondent-mother first argues the trial court erred by failing to appoint a guardian *ad litem* for respondent-mother, pursuant to N.C. Gen. Stat. § 7B-1101.1(c) (2009), given respondent-mother’s history of substance abuse, mental health issues, and issues with controlling her anger. We disagree.

Section 7B-1101.1(c) provides:

On motion of any party or on the court’s own motion, the court may appoint a guardian *ad litem* for a parent . . . if the court determines that there is a reasonable basis to believe that the parent is incompetent or has diminished capacity and cannot adequately act in his or her own interest. . . .

Id. “ ‘A trial judge has a duty to properly inquire into the competency of a litigant in a civil trial or proceeding when circumstances are brought to the judge’s attention, which raise a substantial question as to whether the litigant is *non compos mentis*.’ ” In *re C.G.A.M.*, 193 N.C. App. 386, 390, 671 S.E.2d 1, 4 (2008) (quoting *In re J.A.A.*, 175 N.C. App. 66, 72, 623 S.E.2d 45, 49 (2005)). However, “the trial court is not required to appoint a guardian *ad litem* ‘in every case where substance abuse or some other cognitive limitation is alleged.’ ” *In re J.A.A.*, 175 N.C. App. at 71, 623 S.E.2d at 48 (quoting *In re H.W.*, 163 N.C. App. 438, 447, 594 S.E.2d 211, 216 (2004)). Whether to conduct such an inquiry is left to the sound discretion of the trial judge. *In re C.G.A.M.*, 193 N.C. App. at 390, 671 S.E.2d at 4 (internal citation omitted).

Respondent-mother contends that the trial court had a duty to appoint a guardian *ad litem sua sponte due* to her history of substance abuse, potentially untreated mental health issues, and issues controlling her anger, citing *In re N.A.L.*, 193 N.C. App. 114, 666 S.E.2d 768 (2008), in support of her argument. In *In re N.A.L.*, we held that the trial court abused its discretion by failing to conduct an inquiry as to whether the mother should have been appointed a guardian *ad litem*, where the mother was diagnosed as having Personality Disorder NOS and Borderline Intellectual Functioning, a Full Scale IQ score of 74, and problems controlling her anger. *Id.* at 118-19, 666 S.E.2d at 771-72. After review of the record in this matter, we find this case distinguishable from *In re N.A.L.* and see no abuse of discretion in the trial court’s failure to appoint respondent-mother a guardian *ad litem*.

In *In re N.A.L.*, the petitions alleged dependency as a ground for termination and specifically alleged that the mother was “ ‘incapable

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of providing for the proper care and supervision of the minor child.’ ” *Id.* at 118, 666 S.E.2d at 771. Here, YFS did not allege dependency as a ground for termination and there is no allegation that respondent-mother’s substance abuse and mental health issues resulted in a diminished capacity or rendered her incompetent to participate in the proceedings. Further, nothing in the proceedings raised a question regarding respondent-mother’s competency. The trial court conducted two pretrial hearings before the termination hearing, and the issue was never raised. Throughout, respondent-mother demonstrated sufficient competency to attend and participate in hearings, enter into a mediated agreement regarding the children’s adjudication, enter into a mediated case plan, and file with the trial court a “Summary of Concerns” regarding the children’s visits with their maternal grandparents. Respondent-mother testified on her own behalf at the termination hearing, and nothing in her testimony suggests that she was not competent to participate. Moreover, the record establishes that respondent-mother was well aware of her problems and of what she needed to do to resolve them, but showed an unwillingness to cooperate. She had been in and out of treatment for several years, and made little effort during the two-and-one-half-year history of the case. At the hearing, respondent-mother knew that she needed treatment for substance abuse, and testified that she intended to enter a treatment program. However, her efforts came too late. Based on the foregoing, we conclude that the trial court did not abuse its discretion in not appointing a guardian ad litem sua sponte for respondent-mother.

II

[2] Respondent-mother also argues the trial court abused its discretion by failing to consider all of the statutory factors before determining that termination of her parental rights was in the best interest of N.R. and S.R. We disagree.

After an adjudication determining that grounds existed for terminating parental rights, the trial court determines whether terminating the parent’s rights is in the juvenile’s best interest. N.C. Gen. Stat. § 7B-1110(a) (2009). The statute provides that:

In making this determination, the court shall consider the following:

- (1) The age of the juvenile.
- (2) The likelihood of adoption of the juvenile.

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- (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
- (4) The bond between the juvenile and the parent.
- (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
- (6) Any relevant consideration.

N.C.G.S. § 7B-1110(a). We review the trial court's determination that a termination of parental rights is in the best interest of the juvenile for an abuse of discretion. *In re Anderson*, 151 N.C. App. 94, 98, 564 S.E.2d 599, 602 (2002). "Abuse of discretion exists when the challenged actions are manifestly unsupported by reason." *Barnes v. Wells*, 165 N.C. App. 575, 580, 599 S.E.2d 585, 589 (2004) (internal citations and quotation marks omitted).

Section 7B-110 specifies that the trial "court *shall* consider" each of the listed factors. "This Court has held that use of the language 'shall' is a mandate to trial judges, and that failure to comply with the statutory mandate is reversible error." *In re Eades*, 143 N.C. App. 712, 713, 547 S.E.2d 146, 147 (2001). However, this Court has previously held that it is not an abuse of discretion for the trial court to omit a specific written finding on a statutory factor under section 7B-1110(a), so long as it is apparent that the trial court *considered* all relevant factors. *In re S.C.H.*, — N.C. App. —, —, 682 S.E.2d 469, 475 (2009), *affirmed per curiam*, 363 N.C. 828, 689 S.E.2d 858 (2010). In *In re S.C.H.*, the trial court made specific findings addressing each statutory factor except for the bond between the parent and juvenile. See N.C.G.S. § 7B-1110(a)(4). However, this Court stated that, "in light of the trial court's findings in its adjudication order that respondents last provided gifts to S.C.H. in December 2007; that they have not given any cards or letters to S.C.H.; and that they canceled two of the five visits granted by the trial court in October 2007, it is apparent that the trial court did consider the bond between respondents and S.C.H." *In re S.C.H.*, — N.C. App. at —, 682 S.E.2d at 475. This Court thus concluded "that the trial court's findings are not so deficient as to warrant a conclusion that its determination is manifestly unsupported by reason." *Id.*

Respondent-mother cites a recent decision of this Court remanding for entry of appropriate findings under section 7B-1110(a). *In re E.M.*, — N.C. App. —, —, 692 S.E.2d 629, 631 (2010). However, in that case, we determined that

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the court's order only reflects consideration of the juvenile's age and the permanent plan of adoption. The court's order does not consider the likelihood of adoption of the juvenile, the bond between the juvenile and the parent, or the quality of the relationship between any prospective adoptive parents, custodian, or guardian and the juvenile.

Id. After careful review, we find the case before us more factually analogous to *In re S.C.H.* than to *In re E.M.*

Here, the trial court's order terminating parental rights included the following findings of fact:

2. [S.R.] was born to [respondent-mother] on 4 June 2002. . . .
[N.R.] was born to [respondent-mother] on 22 September 2004. . . .

. . .

55. [Respondent-mother] has moved in with [her great-grand-mother]. None of [respondent-] mother's issues that led to the children coming [into] custody and then to placement in foster care have been resolved. There is no alternative other than leaving the children in foster care.

56. Since entering foster care, the children's attendance at therapy and response to therapy has improved dramatically. Their demeanor has improved. Both children have blossomed and their shyness has abated.

. . .

65. The children have been in the same foster home placement for over a year. The foster parents are interested in adopting the children.

Thus, the trial court made findings concerning the age of the juveniles, the likelihood of adoption, and whether termination will aid in the accomplishment of a permanent plan for the juveniles. The trial court did not make specific findings regarding the bond between respondent-mother and the juveniles and the bond between the foster parents and the juveniles in its order terminating respondent-mother's parental rights. However, as in *In re S.C.R.*, we find evidence in the record demonstrates that the trial court considered these factors in making its dispositional decision.

In its permanency planning review order filed 13 October 2009, the trial court attached and incorporated by reference the YFS report

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in its findings of fact. The YFS report, in turn, states that the “children have blossomed since being placed in the foster home and are bonded with the foster parents. . . . It is apparent that the children and the foster parents are very bonded with each other.” The report also details the foster parents’ involvement with the children during therapy sessions, vacations, educational outings, sports and other extracurricular activities. The YFS report also refers to respondent-mother’s “persistent inability to display positive emotional connections with the children during visits[.]” These findings indicate that the trial court considered the bond between respondent-mother and the juveniles and the bond between the foster parents and the juveniles.

Thus, although we emphasize that the better practice is for trial courts to make specific findings related to the factors listed in section 7B-1110(a) in orders terminating parental rights, we conclude “that the trial court’s findings are not so deficient as to warrant a conclusion that its determination is manifestly unsupported by reason.” *In re S.C.H.*, — N.C. App. at —, 682 S.E.2d at 475. Therefore, the trial court did not abuse its discretion in this regard.

Affirmed.

Judges MCGEE and GEER concur.

KEVIN D. BUCHANAN, EXECUTOR OF THE ESTATE OF KELLY BUCHANAN AND GUARDIAN OF THE PROPERTY OF TIFFANY HOPE BUCHANAN, A MINOR; KEVIN DAVID BUCHANAN, INDIVIDUALLY; AND CHRISTOPHER BUCHANAN, INDIVIDUALLY, PLAINTIFFS v. TERESA HAGY BUCHANAN, DEFENDANT

No. COA09-1085

(Filed 7 September 2010)

1. Wills— plain language unambiguous—no error

The trial court did not err in concluding that defendant received from decedent’s will an estate for years in decedent’s house, defendant had exclusive possession of the house, and plaintiffs received a vested remainder in the same property. The plain language of the will was unambiguous.

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2. Wills— motion for new trial—properly denied—plain language unambiguous

The trial court did not abuse its discretion in denying plaintiffs' motion for a new trial in a wills case as the trial court properly found that the terms of the will were unambiguous.

Appeal by plaintiffs from orders entered on 28 December 2006 and 13 April 2009 by Judge W. Erwin Spainhour in Superior Court, Cabarrus County. Heard in the Court of Appeals 10 February 2010.

Ferguson, Scarbrough, Hayes, Hawkins & DeMay, P.A. by James R. DeMay, for plaintiffs-appellants.

M.T. Lowder & Associates, by Mark T. Lowder, for defendant-appellee.

STROUD, Judge.

Kevin D. Buchanan, individually, as executor of the estate of Kelly Buchanan, and as guardian of the property of Tiffany Hope Buchanan, a minor, and Christopher Buchanan, individually, (collectively referred to as "plaintiffs") appeal from a trial court's order declaring that Teresa Hagy Buchanan ("defendant") received an "estate for years" from decedent's will and an order denying plaintiffs' motion for a new trial. For the following reasons, we affirm the trial court's orders.

I. Background

Kelly Buchanan ("decedent") died testate on 9 September 2005. Decedent was survived by his wife, defendant Teresa Hagy Buchanan, and his three children, plaintiffs Kevin Buchanan, Christopher Buchanan, and Tiffany Buchanan, a minor. Tiffany Buchanan, born 12 May 1992, is the only child from decedent's marriage to defendant. Plaintiffs are decedent's adult children from a prior marriage.

On 27 July 2004, decedent executed his "Last Will and Testament[.]" Upon decedent's death, his "Last Will and Testament" was filed for probate with the Superior Court, Cabarrus County. On 21 November 2005, plaintiffs filed suit in Superior Court, Cabarrus County, seeking a declaratory judgment regarding plaintiffs' and defendant's rights to decedent's residence. Plaintiffs alleged that following decedent's death, defendant moved into his residence at 5750 Flowe Store Road, in Concord, North Carolina, with her adult daughter, despite the terms of decedent's will and plaintiffs' objections. Plaintiffs specifically requested the court to determine (1) whether defendant

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was “barred from dissenting to the Will of [decedent] pursuant to N.C.G.S. § 31A et al[;]” (2) whether defendant had “the right to allow an adult daughter to live on the premises owned by [plaintiffs;]” and (3) defendant’s rights to the residence located at 5750 Flowe Store Road, Concord, Cabarrus County, North Carolina pursuant to Article II of decedent’s “Last Will and Testament.” On 9 January 2006, defendant filed an answer to plaintiffs’ complaint. On 28 December 2006, the trial court entered an order on these matters, finding, *inter alia*,

6. That the Defendant Teresa Hagy Buchanan received an Estate for years by the Last Will and Testament of Kelly Buchanan. Such interest runs until May 12, 2012 (Tiffany Buchanan’s 20th birthday). The interest may be terminated earlier provided Tiffany Buchanan is 18 years or older and graduates from high school.

7. That the Defendant has an exclusive possessory right to the house and lot at 5750 Flowe Store Road, Concord, Cabarrus County, North Carolina. The right to possession includes everything properly appurtenant to, essential or reasonable necessary to the full beneficial use and enjoyment of the property.

8. That Kelly Christopher Buchanan, Kevin David Buchanan and Tiffany Hope Buchanan hold a vested remainder interest in the property. Their possessory right to the property begins at the termination of the Defendant’s Estate for years.

The trial court went on to order that defendant had received an estate for years from decedent’s will; defendant had exclusive possessory right to the subject property during the term of her interest; and plaintiffs held a vested remainder in the subject property.¹

On 8 January 2007, plaintiffs filed a motion for a new trial pursuant to N.C. Gen. Stat. § 1A-1, Rule 59(a)(7) and (9), arguing that the verdict entered by the trial court was contrary to law and not supported by the evidence. Plaintiffs’ primary argument was that it was not decedent’s intention in his will to give defendant exclusive possessory rights in the subject property, where decedent’s children—plaintiffs—had been residing at the time of decedent’s death, but instead it was decedent’s intention to only to give defendant a “right to live in the

1. The trial court entered an order on 24 April 2006 holding that defendant was barred from taking an elective share in decedent’s estate, and that order is not a subject of this appeal.

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home.” By order entered 13 April 2009, the trial court denied plaintiffs’ motion. On 11 May 2009, plaintiffs filed notice of appeal from the trial court’s 28 December 2006 declaratory judgment order and 13 April 2009 order denying their motion for a new trial.

II. Declaratory Judgment

Plaintiffs first contend that “the trial court committed reversible error in finding that defendant received an estate for years under the last will and testament of Kelly Buchanan.” Plaintiffs contend that there is an ambiguity in decedent’s will. Plaintiffs argue that to resolve this ambiguity the court must consider the extrinsic circumstances surrounding the execution of the will “to effectuate [decedent’s] intent and interpret the will according to this intent.” Plaintiffs contend that “the only result supported by the four corners of the will and the attendant circumstances is that [decedent] desired that defendant be allowed to remain in the home and serve as a mother-figure for the minor daughter until the minor became an adult.” Plaintiffs contend that although defendant may live in the home to “serve as a mother-figure,” she may not allow any person of her choosing other than Tiffany to live in the home, although plaintiffs may also live with defendant in the home if they so desire. Plaintiffs conclude that “[a]ll that was conveyed unto defendant by the will was the simple privilege for defendant to live in the home, not some exclusive possessory interest such as an estate for years.”

A. Standard of Review

This Court has held that under the Uniform Declaratory Judgment Act, “the court’s findings of fact are conclusive if supported by any competent evidence; and a judgment supported by such findings will be affirmed, even though there is evidence which might sustain findings to the contrary[.]” *Nationwide Mut. Ins. Co. v. Allison*, 51 N.C. App. 654, 657, 277 S.E.2d 473, 475, *disc. review denied*, 303 N.C. 315, 281 S.E.2d 652 (1981). Thus, “[t]he function of our review is, then, to determine whether the record contains competent evidence to support the findings[] and whether the findings support the conclusions.” *Id.* The trial court’s conclusions of law are reviewable *de novo*. *Cross v. Capital Transaction Grp., Inc.*, 191 N.C. App. 115, 117, 661 S.E.2d 778, 780 (2008) (citation omitted), *disc. review denied*, 363 N.C. 124, 672 S.E.2d 687 (2009).

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B. Decedent's Will

[1] Our Supreme Court has held that “[t]he authority and responsibility to interpret or construe a will rest solely on the court. Its objective is to ascertain the intent of the testator, as expressed in the will, when he made it.” *Wachovia Bank & Trust Co. v. Wolfe*, 243 N.C. 469, 473, 91 S.E.2d 246, 250 (1956) (citation omitted). An established rule of will construction is

“that the intention of the testator is the polar star which is to guide in the interpretation of all wills, and, when ascertained, effect will be given to it unless it violates some rule of law, or is contrary to public policy.” *Clark v. Connor*, 253 N.C. 515, 520, 117 S.E.2d 465, 468 (1960). *Pittman v. Thomas*, 307 N.C. 485, 299 S.E.2d 207 (1983), stated the well established rule:

“The will must be construed, ‘taking it by its four corners’ and according to the intent of the testator as we conceive it to be upon the face thereof and according to the circumstances attendant.” *Patterson v. McCormick*, 181 N.C. 311, 313, 107 S.E. 12 (1921). In referring to the “circumstances attendant” we mean “the relationships between the testator and the beneficiaries named in the will, and the condition, nature and extent of [the testator’s] property.” *Trust Co. v. Wolfe*, 243 N.C. 469, 473, 91 S.E.2d 246, 250 (1956).

Pittman, 307 N.C. at 492-93, 299 S.E.2d at 211. *Hollowell v. Hollowell*, 333 N.C. 706, 712, 430 S.E.2d 235, 240 (1993). However, “[i]f the terms of a will are set forth in clear, unequivocal and unambiguous language, judicial construction is unnecessary[.]” *Morse v. Zatkiewiez*, 5 N.C. App. 242, 246, 168 S.E.2d 219, 223 (1969). (citing 1 *Wiggins*, Wills and Administration of Estates in N. C., § 132, pp. 396, 397, and cases therein cited); see *Wachovia*, 243 N.C. at 474, 91 S.E.2d at 250 (“the attendant circumstances [of the will] are to be considered where the language is ambiguous, or of doubtful meaning.” (citation and quotation marks omitted)).

The relevant portions of decedent’s will state:

ARTICLE II

After complying with the prior provisions of this my LAST WILL AND TESTAMENT, I hereby direct that my wife, TERESA HAGY BUCHANAN, shall have the right to live in my house and lot located at 5750 Flowe Store Road, Concord, Cabarrus County, North Carolina 28025, until such time as my daughter, TIFFANY

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HOPE BUCHANAN, attains the age of eighteen (18) (not to exceed twenty (20) years of age) and is graduated from high school.

. . . .

ARTICLE IV

After complying with the prior provisions of this my LAST WILL AND TESTAMENT, I hereby will, devise and bequeath all of my property of every sort, kind and description, both real and personal, equally unto my children, KELLY CHRISTOPHER BUCHANAN, KEVIN DAVID BUCHANAN, and TIFFANY HOPE BUCHANAN, share and share alike, to have and to hold the same, absolutely and forever.

I specifically and intentionally make no further provisions for my wife, TERESA HAGY BUCHANAN, other than hereinabove provided.

. . . .

ARTICLE V

If my daughter, TIFFANY HOPE BUCHANAN, is a minor as defined by the laws of the State of North Carolina at the time of my death, I hereby appoint KEVIN DAVID BUCHANAN, my son, guardian of the person and property of said minor child, and said guardian shall have exclusive control of the person, custody, care, and property of said minor child. I direct that no bond or other undertaking be required of said guardian for the performance of the duties of such office.

This Court has held that “[e]very estate which by the terms of its creation must expire at a period certain and prefixed by whatever words created, is an estate for years.” *Gurtis v. Sanford*, 18 N.C. App. 543, 545, 197 S.E.2d 584, 586 (1973) (quoting *Webster’s Real Estate Law in North Carolina*, § 65, p. 79); *King v. Foscue*, 91 N.C. 116, 119-20 (1884) (“an estate for years,” is defined as, “an estate for a definite period of time[.]”); *Nokes v. Shaw*, 1 N.C. 576, 579 (1803) (“every estate by whatever words created, that has a certain commencement and certain ending, is an estate for years”). The tenant in an estate for years has the right to possession and enjoyment of the property conveyed “in the absence of anything in the deed indicating a contrary intention, [and] carries with it everything properly appurtenant to, that is, essential or reasonably necessary to the full beneficial use and

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enjoyment of the property conveyed.” *Rickman Mfg. Co. v. Gable*, 246 N.C. 1, 15, 97 S.E.2d 672, 681 (1957). “An estate is vested when there is either an immediate right of present enjoyment or a present fixed right of future enjoyment.” *Joyner v. Duncan*, 299 N.C. 565, 569, 264 S.E.2d 76, 82 (1980) (citation omitted). “A vested remainder is a present fixed right in the remainderman to take possession upon the natural termination of the preceding estate with no conditions precedent imposed on the time for the remainder to vest in interest.” *Id.* (citing *Chas. W. Priddy & Co. v. Sanderford*, 221 N.C. 422, 424, 20 S.E.2d 341, 343 (1942) (stating that a “remainder is vested, when, throughout its continuance, the remainderman and his heirs have the right to the immediate possession whenever and however the preceding estate is determined; or, in other words, a remainder is vested if, so long as it lasts, the only obstacle to the right of immediate possession by the remainderman is the existence of the preceding estate; or, again, a remainder is vested if it is subject to no condition precedent save the determination of the preceding estate.”)).

Here, Article II of decedent’s will directs that defendant “shall have the right to live in my house . . . until such time as my daughter, TIFFANY HOPE BUCHANAN, attains the age of eighteen (18) (not to exceed twenty (20) years of age) and is graduated from high school.” As the plain language of decedent’s will is “clear, unequivocal, and unambiguous” we need not apply “judicial construction” or look to “the attendant circumstances” to determine decedent’s intent. *Morse*, 5 N.C. App. at 246, 168 S.E.2d at 223; *Wachovia*, 243 N.C. at 474, 91 S.E.2d at 250. Article II of decedent’s will sets forth a certain period that defendant’s “right to live” in the subject property must expire, which is the date when Tiffany Buchanan has attained the age of 18 and graduated from high school, but not beyond age twenty. Therefore, defendant received an estate for years from decedent’s will in the subject property. *See Gurtis*, 18 N.C. App. at 545, 197 S.E.2d at 586.

Plaintiffs argue that the fact that decedent’s will made a “testamentary recommendation” of plaintiff Kevin Buchanan as guardian of the person and property of Tiffany demonstrates an intent to grant plaintiff Kevin Buchanan the right to live in the home with Tiffany. *See* N.C. Gen. Stat. § 35A-1225 (2005). We note that N.C. Gen. Stat. § 35A-1225 provides that a parent may make a recommendation for guardianship of a minor child upon a parent’s death, although this recommendation would only become relevant if defendant were to abandon Tiffany or to die while Tiffany is still a minor. *See* N.C. Gen.

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Stat. § 35A-1220 (2005). However, we see no provision in Chapter 35A, Article 6 which would indicate that a guardianship recommendation also confers a right for the potential guardian to reside in the same home with the minor child, particularly when the child is still in the care of her natural guardian, her mother.

Article IV states that decedent devises “all of [his] property of every sort, kind and description, both real and personal, equally unto [plaintiffs],” which would include decedent’s house at “5750 Flowe Store Road.” We hold that this portion of decedent’s will is also unambiguous. *Morse*, 5 N.C. App. at 246, 168 S.E.2d at 223; *Wachovia*, 243 N.C. at 474, 91 S.E.2d at 250. Decedent could not bequest a present possessory estate to any other person in the subject property, as Article II of his will had already given an estate for years to defendant in the subject property. However, decedent’s will does give a present fixed right to plaintiffs in the subject property as remaindermen. Also, there are no conditions or obstacles to plaintiffs’ immediate possession following the natural termination of defendant’s preceding estate for years. Therefore, by the terms of the decedent’s will, plaintiffs received a vested remainder in the subject property. *See Joyner*, 299 N.C. at 569, 264 S.E.2d at 82; *Chas. W. Priddy & Co.*, 221 N.C. at 424, 20 S.E.2d at 343. Accordingly, we overrule plaintiffs’ arguments.

Plaintiffs also contend that the phrase “the right to live in my home” in Article II of decedent’s will is ambiguous when considered with “the language in Article IV where [decedent] specifically and intentionally makes no further provisions for defendant.” (Emphasis in original.) However, although decedent’s will says it makes “no further provisions for defendant[,]” the will did previously make “provision for defendant” by the present possessory interest of an estate for years in the subject property. Therefore, when Article IV is read in context with Article II, decedent’s will merely specifies that beyond the estate for years in the subject property, decedent “specifically and intentionally [made] no further provisions” for defendant in his will. Therefore, plaintiffs’ argument is overruled. We hold that the evidence supports the trial court’s findings and those findings support the trial court’s conclusions that defendant received from decedent’s will an estate for years in decedent’s house, defendant has exclusive possession, and plaintiffs received a vested remainder in the same property. *Nationwide Mut. Ins. Co.*, 51 N.C. App. at 657, 277 S.E.2d at 475. Accordingly, we affirm the trial court’s declaratory judgment.

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III. Motion for a New Trial

[2] Plaintiffs also contend that the trial court abused its discretion in denying plaintiffs' motion for a new trial pursuant to Rule 59(a)(7) and (9). The standard of review for denial of a N.C. Gen. Stat. § 1A-1, Rule 59 (2005) motion is well-settled:

According to Rule 59, a new trial may be granted for the reasons enumerated in the Rule. By using the word may, Rule 59 expressly grants the trial court the discretion to determine whether a new trial should be granted. Generally, therefore, the trial court's decision on a motion for a new trial under Rule 59 will not be disturbed on appeal, absent abuse of discretion.

Greene v. Royster, 187 N.C. App. 71, 77-78, 652 S.E.2d 277, 282 (2007) (citations, quotation marks, brackets, and footnote in original omitted). Plaintiffs argue that the trial court's findings were insufficient as there was "no evidence, either from the four corners of the will or the attendant circumstances, to support a finding that [decedent] intended for defendant to possess the 5750 Flowe Store Road property to the exclusion of plaintiff Kevin Buchanan[.]" and "[t]he trial court failed to make any finding relating to the intent of [decedent] or the attendant circumstances surrounding the execution of the will." (Emphasis in original.)

As stated above, the Court need not look to the "the attendant circumstances" to determine decedent's intent "if the terms of a will are . . . clear, unequivocal and unambiguous[.]" *Morse*, 5 N.C. App. at 246, 168 S.E.2d at 223. We have already determined that the trial court properly found that the language of the will was unambiguous. Therefore, plaintiffs' argument is overruled. Accordingly, we hold the trial court did not abuse its discretion in denying plaintiffs' motion for a new trial.

IV. Conclusion

We affirm the trial court's declaratory judgment holding that defendant received from decedent's will an estate for years in the subject property, that her possessory right during the estate for years is exclusive, and plaintiffs received from decedent's will a vested remainder in the subject property. We also affirm the trial court's denial of plaintiffs' motion for a new trial.

AFFIRMED.

Judges BRYANT and ELMORE concur.

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DORIS-MARIE MARTIN, PLAINTIFF v. RUSSELL M. MARTIN, DEFENDANT

No. COA09-1454

(Filed 7 September 2010)

1. Divorce— alimony—modification of alimony—change of circumstances—dependant spouse—no error

The trial court did not err in concluding that plaintiff was entitled to an increase in monthly alimony payments from defendant. The trial court's findings of fact were supported by competent evidence, and those findings supported the conclusion that a change of circumstances required modification of the alimony order.

2. Attorney fees— modification of alimony—dependant spouse —no error

The trial court did not err in concluding that plaintiff was entitled to attorney fees pursuant to N.C.G.S. § 50-16.4. Plaintiff was the dependent spouse, entitled to a modification of alimony, and did not have sufficient means to defray necessary expenses as her current expenses outweighed her income.

3. Costs— expert witness fees—modification of alimony—dependant spouse—error

The trial court erred in awarding plaintiff expert witness fees in a modification of alimony case. Plaintiff's expert was not subpoenaed to testify and there is no statutory authority in N.C.G.S. § 50-16.4 for the imposition of expert fees.

Appeal by defendant from judgment entered 21 November 2008 by Judge Marvin P. Pope, Jr., in Buncombe County District Court. Heard in the Court of Appeals 15 April 2010.

Gum, Hillier & McCroskey, P.A., by Howard L. Gum, and Carter & Kropelnicki, P.A., by Steven Kropelnicki, Jr., for plaintiff.

The McDonald Law Office, P.A., by Diane K. McDonald, for defendant.

ELMORE, Judge.

This appeal stems from Doris-Marie Martin's (plaintiff) alimony modification request and subsequent order, entered 21 November 2008, which increased Russell M. Martin's (defendant) alimony obligation to

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\$4,400.00 a month. Plaintiff and defendant were divorced on 1 April 1983. Following the divorce, the parties entered into a consent judgment on 30 April 1984 (1984 judgment) which, among other things, required defendant to pay monthly alimony in the amount of \$2,425.00 to plaintiff until death or her remarriage and to continue carrying life insurance with plaintiff as the beneficiary. On May 1990, pursuant to the 1984 judgment, defendant's obligation was reduced to \$1,540.50 a month after he satisfied the indebtedness on the marital home.

On 11 December 1998, plaintiff filed a motion to modify the prior order, requesting an increase in monthly payments because her income was not sufficient to meet her reasonable and necessary expenses. On 5 May 1999, defendant responded in opposition to an increase in alimony with a request to reduce the alimony obligation. The court modified the alimony order on 17 April 2001 (2001 order), requiring defendant to pay \$2,600.00 a month. On 26 February 2007, defendant filed a motion to reduce the amount of alimony resulting from the 2001 modification and to reduce the amount of life insurance he was required to carry under the 1984 judgment. Plaintiff filed a motion to increase the alimony award, citing a substantial change in circumstances, on 31 July 2008. On 21 November 2008, the trial court granted plaintiff's request for an increase in alimony, awarded her attorneys' fees, and held that the remaining portions of the 2001 order were to remain in full effect. Defendant now appeals.

I. Modification of 2001 Order

[1] Defendant first argues that the trial court erred when it concluded that plaintiff was entitled to an increase in monthly alimony payments. According to N.C. Gen. Stat. § 50-16.9, an alimony award “may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested.” N.C. Gen. Stat. § 50-16.9 (2009). In general, the change of circumstances required for modification of an alimony order “must relate to the financial needs of the dependent spouse or the supporting spouse's ability to pay.” *Rowe v. Rowe*, 305 N.C. 177, 187, 287 S.E.2d 840, 846 (1982). A court should also consider the sixteen factors listed in N.C. Gen. Stat. § 50-16.3A(c) when considering modification of an alimony order; among those factors are the relative earnings of the spouses and relative needs of the spouses. *Swain v. Swain*, 179 N.C. App. 795, 800, 635 S.E.2d 504, 507 (2006). “Decisions regarding the amount of the alimony are left to the sound discretion of the trial judge and will not be disturbed on appeal unless there has been a manifest abuse of that

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discretion.” *Bookholt v. Bookholt*, 136 N.C. App. 247, 249-50, 523 S.E.2d 729, 731 (1999) (citation omitted), *superseded by statute in part*, N.C. Gen. Stat. § 50-16.9(b) (2009).

Defendant states that the trial court erred in numerous findings of fact because they were not supported by evidence. Specifically, he claims that findings of fact pertaining to his net worth, plaintiff’s expenses, and plaintiff’s income were not supported by evidence, and as such the trial court’s conclusion of law that “changed circumstances” exist is in error. We consider each of these findings of fact in turn below, but we first consider defendant’s overall arguments regarding the trial court’s order.

Regarding his net worth analysis, defendant argues that his income is limited to Social Security, an annuity, and a retirement account that is depleting rather quickly. He claims that he will not have the ability to pay an increase in alimony. However, evidence presented at trial showed that defendant still had \$263,709.00 in a Merrill Lynch retirement account and that he had elected to take a distribution of \$123,000.00 for 2008. According to finding of fact 38, defendant has a total of \$6,763.00 in expenses per month or \$81,156.00 in expenses per year. The court also found in finding of fact 39 that half of that amount, \$3,382 monthly or \$40,578.00 yearly, should be considered the expenses of defendant’s current spouse. As such, defendant received \$82,422.00 more from the distribution of his retirement account than was necessary to cover his expenses. We decline therefore to hold that the trial court erred in its conclusion that defendant’s “excess expenditures were voluntary on the part of the defendant, and unreasonable in view of his obligation to pay alimony to the plaintiff.”

Concerning plaintiff’s expenses, defendant argues that the increases in plaintiff’s needs stem from two “unexplained” mortgages on her home and her choice not to obtain full-time employment. However, the evidence presented at trial regarding the mortgages showed that plaintiff (1) refinanced her home to pay off the first mortgage on the home and to meet increases in taxes, insurance, and maintenance on the 36-year-old home; and (2) borrowed from equity to make repairs to the home after a tree fell on it. Plaintiff presented evidence that the home needed a new boiler system, which cost over \$15,000.00, and also produced receipts for 2008 showing that she spent over \$15,000.00 in maintenance, which includes the amount for repair from the fallen tree.

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As to plaintiff's employment status, the evidence presented at trial showed that she had to miss time from work after the city condemned her home in order to "contend with the inordinate amount of time necessary for dealing with her insurance company, city building inspectors, contractors, roofers, painters and the other multitude of people need [sic] to get her house repaired[.]" As she prepared to return to work, she "broke two toes, one on each foot, and her doctor kept her out of work for several more weeks[.]" These circumstances resulted in plaintiff's income being substantially less in 2008.

Having addressed defendant's general arguments, we now turn to his arguments concerning specific findings of fact in the trial court's order modifying alimony.

Defendant alleges that the court erred in finding of fact 5, which states that the 1984 judgment provided that his alimony obligation "be reduced once he had discharged the indebtedness encumbering the residence of the Plaintiff[.]" Evidence presented by plaintiff showed that the mortgage was paid off by a second mortgage, which increased the debt on the house in order to pay for necessary repairs, and which was found to be "necessary and reasonable" by the trial court in the 2001 order. As such, this assignment of error is overruled.

Defendant next challenges finding of fact 7, which states that plaintiff and defendant "equally" divided their marital property as part of the 1984 judgment. Defendant is correct that there appears to be no evidence in the record that supports a description of the distribution as "equal" (in the sense of half to one party and half to the other); however, aside from this inaccurate adverb, the rest of the finding of fact is supported by the evidence.

Defendant's challenge to finding of fact 16 asserts that no evidence exists to support plaintiff's expert's (Foster Shriner, CPA) discovery responses about the amount of defendant's discretionary income. However, later in his brief, defendant concedes that "[t]he information contained in finding of fact #16 is from Mr. Shriner's testimony." Defendant's argument therefore seems to be questioning not the existence but rather the validity of the evidence to support finding of fact 16. As we have previously held, "findings of fact are conclusive on appeal if there is evidence to support them, even though evidence may sustain findings to the contrary." *Cox v. Cox*, 33 N.C. App. 73, 75, 234 S.E.2d 189, 190 (1977). Since competent evidence

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in support of finding of fact 16 was presented to the court, this finding is not in error.

Defendant challenges finding of fact 22 on the basis that it does not accurately represent the evidence. Finding 22 states that defendant's 2008 annual income will total a minimum of \$195,032.00: \$24,129.00 from Social Security benefits, \$47,883 from his Met Life annuity, and \$123,000.00 in payments from his retirement distribution. Defendant testified to the existence and exact amounts of each of these payments, and as such, there is no error in the trial court's determination of his annual income in finding of fact 22.

Defendant next challenges finding of fact 30, which states that he is under no legal obligation to provide support for his adult son, and therefore the mortgage payments that defendant makes on the condominium his son lives in should not be considered in defendant's reasonable monthly expenses. Defendant testified that he and his wife bought the property to give his son a place to live. However, no evidence was presented to show that defendant was under any legal obligation to do so. As the support of his adult son is a discretionary expense, the trial court did not err in finding that the mortgage payment and condominium fee should not be considered in defendant's reasonable monthly expenses.

Finding of fact 32 states that the appraised value of defendant's property on Abingdon Way was \$1,419,500.00. Plaintiff's appraisal value as presented to the court was actually \$1,417,500.00, and the house in fact sold for \$1,250,000.00. As above, defendant is correct that this finding of fact reflects a slight error in compiling the evidence presented; and, again, this finding of fact is correct with the exception of what is, essentially, a typo.

Defendant next challenges finding of fact 40, which states that Magic Mountain Press, a publishing company established by defendant and his current wife, has lost money all but one year of its existence, and that those losses are funded solely by defendant and his stated income. Defendant's wife's testimony adequately support these assertions, and as such, this finding is supported by competent evidence.

Defendant next asserts that finding of fact 42, which states that defendant has sold a boat, two cars, and a time share in Hilton Head, is not "an accurate statement" of his downsizing efforts. Defendant explicitly testified to each of these facts, and his testimony is competent evidence to support the finding.

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Defendant next challenges finding of fact 44, which is a recitation of defendant's current assets and liabilities. As the finding specifically states that defendant's net worth was determined "based upon the testimony of the Defendant and Foster Shriener, CPA, Plaintiff's expert, and the evidence presented," we again find the defendant's challenge to be to the validity of the evidence, rather than to its existence. As such, this assignment of error is overruled.

Defendant next challenges finding of fact 48, which states that plaintiff received unemployment benefits from December 2002 until 2004. Specifically, he argues that the finding of fact is in error because it does not specify the exact amount of benefits she received, a detail that defendant asserts renders the finding "not an accurate statement of the evidence[.]" The trial court's failure to provide defendant's desired level of specificity in its findings of fact—findings that are so clearly supported by the evidence that defendant cites them in his own brief—does not constitute an error by the trial court. This assignment of error is overruled.

Defendant next challenges finding of fact 52, which states that plaintiff's employment income will be lower in 2008 than in previous years. Defendant states that the reasons given for the lower income by the trial court are not an accurate statement of the evidence. However, each portion of finding of fact 52 was testified to by plaintiff, with little contradictory evidence presented by defendant. The trial court did not err by basing this finding of fact on the evidence.

Defendant next challenges findings of fact 58 and 59, which summarize plaintiff's living expenses. Defendant's sole argument on this point is that the trial court erred in finding that a mortgage payment of \$1,886.00 is "consistent with the marital standard of living." Defendant does not elaborate on this argument further, and we decline to construct an argument for him on the point.

Defendant next challenges three of the lettered subsections of finding of fact 60, which recites various items of evidence regarding plaintiff's current expenses. Subsection g states that plaintiff lives in the former marital home and has done so for thirty-six years, and that a "significant portion" of her monthly expenses comes from her housing costs. Defendant acknowledges that this is an "accurate statement of the evidence as to what the Plaintiff has done," but disputes that such an amount is "reasonable." As the finding of fact does not characterize the expenses as "reasonable," this argument is irrelevant. Next, defendant challenges the portion of subsection i that states that the balance due

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on plaintiff's home equity line of credit is approximately \$46,814.00, and that plaintiff "has consistently paid \$1,000 a month toward reducing the balance of the equity line." Defendant argues that plaintiff testified that she was going to receive \$30,000.00 credit toward that line, reducing it to \$16,000.00. Plaintiff in fact testified that she *hoped* to be able to put that money toward the line of credit. Further, we note that, again, defendant does not argue that this finding of fact is incorrect, but rather that it does not contain all the information he would prefer it included; this, again, does not constitute error. Finally, defendant challenges subsection k's finding that plaintiff needs \$300.00 per month to maintain the home. Defendant's sole support for his argument that this is incorrect comes from one line from plaintiff's testimony, namely: "I don't have a lot of maintenance for the home." Defendant does not address the specific figures the trial court accurately lays out in this finding of fact that support the \$300.00 a month figure, or suggest that evidence does not support those figures. As such, we overrule this assignment of error.

Defendant next challenges finding of fact 65, which summarizes various pieces of testimony by Foster Shriner, plaintiff's expert. As before, however, plaintiff does not argue that the finding of fact is not supported by competent evidence—indeed, he recites the relevant testimony in his brief—but instead challenges the validity of the evidence. As before, we overrule this assignment of error.

Finally, defendant's challenges to findings of fact 64, 67, 68, 69, 70, and 72 and conclusions of law 83, 84, and 85 are based on this Court holding that previous findings of fact are invalid. As we have declined to do so, these assignments of error are overruled.

II. Attorneys' Fees

[2] Defendant argues that the trial court erred when it concluded that plaintiff was entitled to attorneys' fees because no statutory authority exists for the award. On the contrary, according to N.C. Gen. Stat. § 50-16.4, a court may award attorneys' fees to the dependent spouse when "a dependent spouse would be entitled to alimony . . ." N.C. Gen. Stat. § 50-16.4 (2009). Further, "an award of counsel fees is appropriate whenever it is shown that the spouse is, in fact, dependent, is entitled to the relief demanded, and is without sufficient means whereon to subsist during the prosecution and defray the necessary expenses thereof." *Fungaroli v. Fungaroli*, 53 N.C. App. 270, 273, 280 S.E.2d 787, 790 (1981). This also extends to appeals in which the supporting spouse is the appellant. *Id.* In this case, plaintiff is the dependent spouse,

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entitled to a modification of alimony, and she does not have sufficient means to defray necessary expenses as her current expenses outweigh her income. Accordingly, the trial court was correct to award attorney's fees to plaintiff.

III. Expert Witness Fees

[3] Defendant also argues that the trial court erred when it concluded that plaintiff was entitled to expert witness fees. Plaintiff concedes that her expert was not subpoenaed to testify and that the court could not award expert witness fees for his testimony. It is also important to note there is no statutory authority in N.C. Gen. Stat. § 50-16.4 for the imposition of expert fees. Accordingly, we hold that the trial court committed error.

IV. Remaining Portions of the 2008 Order

Defendant also argues that the trial court erred when it decreed that all remaining portions of the 21 November 2008 order remained in full force and effect. Specifically, defendant claims that finding of fact 6 is not supported by evidence. However, finding of fact 6 is supported by the testimony of plaintiff's expert, who stated that the cash surrender value could be used to pay the premiums. Further, the life insurance policy is necessary to ensure the alimony payments to plaintiff if defendant were to pass away. Accordingly, we affirm.

V. Conclusion

We reverse the trial court's order as it concerns expert witness fees, but affirm in all other regards.

Reversed in part, affirmed in part.

Judges BRYANT and ERVIN concur.

WADDELL v. METROPOLITAN SEWERAGE DIST. OF BUNCOMBE CNTY.

[207 N.C. App. 129 (2010)]

TIMOTHY R. WADDELL, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF JILL J. WADDELL, DECEASED, AND WILLIAM WAYNE JAMESON, AS GUARDIAN AD LITEM OF EMILY WADDELL, A MINOR CHILD, AND REID WADDELL, A MINOR CHILD, PLAINTIFFS V. METROPOLITAN SEWERAGE DISTRICT OF BUNCOMBE COUNTY, TYCOLE ENTERPRISES, LLC, CIVIL DESIGN CONCEPTS, P.A., JUDITH W. DAWKINS, REALTY EXECUTIVES WNC, INC., KEITH VINSON, AND WAIGHTSTALL MOUNTAIN, LLC, DEFENDANTS

No. COA09-620-2

(Filed 7 September 2010)

1. Costs— appeal—taxed against plaintiffs’ counsel—failure to submit complete record

The costs of plaintiffs appeal from the trial court’s order granting summary judgment in favor of two defendants was taxed against plaintiffs’ counsel, personally. Plaintiffs’ counsel failed to include in the record on appeal the orders of the trial court disposing of plaintiffs’ claims against the other defendants to show that the orders granting summary judgment in favor of defendant-appellees were final judgments.

2. Negligence— contributory negligence—summary judgment proper

The trial court did not err by granting summary judgment in favor of defendants on plaintiffs’ negligence claim arising out of a fatal sledding accident. The evidence presented at the summary judgment hearing clearly established that plaintiffs’ decedent was contributorily negligent in sledding down a hill and colliding with an open and obvious above-ground manhole.

Appeal by plaintiffs from orders entered 7 and 8 October 2008 by Judge J. Marlene Hyatt in Buncombe County Superior Court. Heard in the Court of Appeals 4 November 2009. Opinion filed 22 December 2009. Motion to amend record on appeal and withdraw opinion allowed. The following opinion supersedes and replaces the opinion filed 22 December 2009.

Motley Rice LLC, by John D. Hurst; and Wallace and Graham, P.A., by Michael B. Pross, for plaintiff-appellants.

Little & Little, PLLC, by Cathryn M. Little, for defendant-appellee Metropolitan Sewerage District of Buncombe County.

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Van Winkle, Buck, Wall, Starnes and Davis, P.A., by W. James Johnson and Matthew W. Kitchens for defendant-appellee Civil Design Concepts, P.A.

STEELMAN, Judge.

Where the evidence presented at the summary judgment hearing clearly established that Ms. Waddell was contributorily negligent in sledding down a hill and colliding with an open and obvious above-ground manhole, the trial court did not err in granting summary judgment in favor of MSD and CDC.

I. Factual and Procedural Background

On 30 November 2004, Timothy and Jill Waddell purchased a home in Arden, Buncombe County, North Carolina. Following a snowfall of approximately three inches on 29 January 2005, Ms. Waddell went outside with her children to play in the snow, using an inner tube to slide down a 100 to 150 foot hill. The inner tube used by Ms. Waddell rotated, resulting in her going down the hill backwards. She collided with a sewer manhole that was elevated approximately one and a half feet above ground on the uphill side and approximately two and a half feet above the ground on the downhill side, and suffered injuries resulting in her death.

On 30 December 2005, Timothy Waddell, individually and as Administrator of the Estate of Jill Waddell, and William Jameson as Guardian *ad litem* of Emily and Reid Waddell (collectively, plaintiffs) filed this action seeking monetary damages as a result of the death of Ms. Waddell. A second amended complaint was filed on 23 January 2007. The complaint alleged negligence and gross negligence against numerous defendants based upon a variety of legal theories as follows: (1) Metropolitan Sewerage District of Buncombe County (MSD) for negligence in the design and approval of the sewer, failing to maintain its sewer easement in a safe condition, and failing to warn of and conceal the manhole that protruded two and a half feet above the ground; (2) TyCole Enterprises, LLC, for negligence in the design and implementation of the grading of the area; (3) Waightstill Mountain, LLC and Keith Vinson for negligence in the development of the subdivision, and in the hiring and supervising of the design and installation of the manhole; (4) Civil Design Concepts, P.A. (CDC) for negligence in the design and engineering resulting in a manhole that protruded two and a half feet above the ground and for failing to warn of the dangerous condition; (5) Judith Dawkins for negligence as a realtor for failure to

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warn as to the dangers of the manhole that protruded two and a half feet above the ground; and (6) Realty Executives WNC, Inc. for negligence based upon the conduct of Judith Dawkins. Plaintiffs also alleged claims for wrongful death, negligent infliction of emotional distress, nuisance, punitive damages, and equitable relief.¹

On 3 September 2008, MSD moved for summary judgment on all liability issues. That same day, all defendants filed a joint motion for summary judgment based upon plaintiff's contributory negligence. On 10 September 2008, CDC separately moved for summary judgment. On 7 and 8 October 2008, the trial court granted summary judgment in favor of CDC and MSD, respectively. Plaintiffs appealed.

The record on appeal failed to contain any orders or dismissals which established that McGill Associates, P.A., Hutchinson-Biggs & Associates, Inc., T & K Utilities, Inc., Design Associates, and Waightstill Mountain Property Owners Association, Inc. had been dismissed from the case. The record also failed to contain any ruling as to the joint motion for summary judgment with regards to TyCole Enterprises, LLC, Judith Dawkins, Realty Executives WNC, Inc., Keith Vinson, and Waightstill Mountain, LLC. Consequently, this Court dismissed the appeal as interlocutory because the orders granting summary judgment in favor of MSD and CDC did not dispose of all the claims and defendants, leaving further matters for resolution by the trial court. Plaintiffs made no argument as to the existence of a substantial right and the record did not contain a Rule 54(b) certification.

On 11 January 2010, plaintiff filed a motion to amend the record on appeal to include the orders of the trial court disposing of the claims against the remaining defendants to show that the orders granting summary judgment in favor of CDC and MSD were final judgments. We allow this motion to amend to include in the record the orders voluntarily dismissing McGill Associates, P.A., Hutchinson-Biggs & Associates, Inc., T & K Utilities, Inc., Design Associates, and Waightstill Mountain Property Owners Association, Inc., and the orders granting summary judgment in favor of TyCole Enterprises, LLC, Judith Dawkins, Realty Executives, Keith Vinson, and Waightstill Mountain, LLC.

[1] "It is the duty of the appellant to ensure that the record is complete." *Hicks v. Alford*, 156 N.C. App. 384, 389, 576 S.E.2d 410, 414 (2003). Rule 9(a)(1)(j) of the North Carolina Rules of Appellate Procedure provides

1. Plaintiffs make no arguments as to these claims on appeal.

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that the record on appeal in civil actions shall contain “copies of all other papers filed and statements of all other proceedings had in the trial court which are necessary to an understanding of all issues presented on appeal unless they appear in the verbatim transcript of proceedings” N.C.R. App. P. 9(a)(1)(j). Because plaintiffs’ counsel violated this rule, in our discretion, we tax the costs of this appeal against plaintiffs’ counsel, personally. Plaintiffs’ counsel could have avoided this confusion by: (1) including prior dismissals as to certain parties and prior orders of the court dismissing other parties in the original record on appeal; and (2) reciting in the procedural history of the case that their claims against all other parties had been dismissed.

II. Standard of Review

The standard of review on a trial court’s ruling on a motion for summary judgment is *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007). The entry of summary judgment is appropriate where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007). “All inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the party opposing the motion.” *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989) (citation omitted). In a negligence action, summary judgment for defendant is proper “where the evidence fails to show negligence on the part of defendant, or where contributory negligence on the part of plaintiff is established, or where it is established that the purported negligence of defendant was not the proximate cause of plaintiff’s injury.” *Hale v. Power Co.*, 40 N.C. App. 202, 203, 252 S.E.2d 265, 267 (citation omitted), *disc. review denied*, 297 N.C. 452, 256 S.E.2d 805 (1979).

III. Alleged Negligence of MSD and CDC

[2] In their first argument, plaintiffs contend that the trial court erred by granting summary judgment in favor of MSD and CDC because there were genuine issues of material fact regarding their negligence.

Plaintiffs argue that MSD and CDC were negligent by breaching the applicable standard of care by elevating the manhole eighteen inches above the grade.

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Standard of Care

In order to establish negligence on the part of MSD or CDC, plaintiffs must establish: “(1) the nature of the defendant’s profession; (2) the defendant’s duty to conform to a certain standard of conduct; and (3) a breach of the duty proximately caused injury to the plaintiffs.” *Associated Indus. Contr’rs, Inc. v. Fleming Eng’g, Inc.*, 162 N.C. App. 405, 413, 590 S.E.2d 866, 872 (2004), *aff’d*, 359 N.C. 296, 608 S.E.2d 757 (2005).

The standard of care provides a template against which the finder of fact may measure the actual conduct of the professional. The purpose of introducing evidence as to the standard of care in a professional negligence lawsuit “is to see if this defendant’s actions ‘lived up’ to that standard” *Little v. Matthewson*, 114 N.C. App. 562, 567, 442 S.E.2d 567, 570 (1994), *aff’d per curiam*, 340 N.C. 102, 455 S.E.2d 160 (1995). Ordinarily, expert testimony is required to establish the standard of care. *Bailey v. Jones*, 112 N.C. App. 380, 387, 435 S.E.2d 787, 792 (1993).

Id. at 410, 590 S.E.2d at 870.

Reason for Elevated Manhole

The original plans for the design of the manhole provided that it be at ground level. However, Daniel Cook, MSD’s inspector, testified that “[d]uring the time of the inspection, the slope of the land was such that [he] was afraid the manhole would get covered up by erosion or grading or some activity.” Cook further stated that “[a]t the time of inspection on the uphill side of the manhole, the ground was encroaching on the lid.” Cook explained that if the manhole got covered with leaves, dirt, or other debris, that it would cause a problem because they would be unable to locate the manhole. Based upon this assessment, MSD’s inspector ordered the manhole be elevated.

Plaintiffs’ Expert Testimony

Plaintiffs had a total of three experts who were deposed on the question of whether MSD or CDC breached the applicable standard of care by elevating the manhole above grade. A review of these depositions shows that plaintiffs’ expert testimony about whether MSD and CDC breached the applicable standard of care was equivocal, at best. Even assuming *arguendo* that MSD and CDC were negligent, plaintiffs’ claims fail because Ms. Waddell was contributorily negligent in sledding down the hill as discussed *infra*.

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Maintenance and Duty to Warn

Plaintiffs alternatively argue that MSD was negligent by failing to maintain the premises in a safe condition and warn the Waddells of the hazard created by the manhole.²

It is well-settled that owners and occupiers of land have a “duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors.” *Nelson v. Freeland*, 349 N.C. 615, 632, 507 S.E.2d 882, 892 (1998), *reh’g denied*, 350 N.C. 108, 533 S.E.2d 467 (1999); *see also Green v. Duke Power Co.*, 305 N.C. 603, 611, 290 S.E.2d 593, 598 (1982) (“[T]he owner of the easement is the party to be charged with its maintenance.”).

“Reasonable care” requires that the landowner not unnecessarily expose a lawful visitor to danger and give warning of hidden hazards of which the landowner has express or implied knowledge. *Id.* (citing *Norwood v. Sherwin-Williams Co.*, 303 N.C. 462, 467, 279 S.E.2d 559, 562 (1981)). *There is no duty to protect or warn, however, “against dangers either known or so obvious and apparent that they reasonably may be expected to be discovered.” Von Viczay v. Thoms*, 140 N.C. App. 737, 739, 538 S.E.2d 629, 631 (2000), *affirmed*, 353 N.C. 445, 545 S.E.2d 210 (2001) (citing *Lorinovich v. K Mart Corp.*, 134 N.C. App. 158, 162, 516 S.E.2d 643, 646 (1999)). Moreover, a landowner is not required to warn of hazards of which the lawful visitor has “equal or superior knowledge.” *Id.* (citation omitted).

Bolick v. Bon Worth, Inc., 150 N.C. App. 428, 430, 562 S.E.2d 602, 604 (citation omitted), *disc. review denied*, 356 N.C. 297, 570 S.E.2d 498 (2002).

In the instant case, plenary evidence in the record established that the elevated manhole was an open and obvious condition. The manhole was approximately one and a half feet above ground on the uphill side and two and a half feet above the ground on the downhill side. The manhole was four feet in diameter. The Waddells had lived at the residence for approximately two months. Mr. Waddell testified that the manhole was visible from his back porch. The manhole was not surrounded or obscured by any trees or bushes. On the day of the accident it had snowed about three inches. Mr. Waddell testified that

2. Plaintiffs’ complaint asserts this cause of action against CDC. However, plaintiffs make no argument on appeal as to CDC regarding any duty to warn.

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on the day of the accident, as he stood on the edge of his backyard, his wife and the manhole were clearly visible.

MSD had no duty to warn Ms. Waddell of an open and obvious danger as to which Ms. Waddell had equal knowledge prior to the injury. *Id.* Even if MSD had breached a duty to warn, plaintiffs' claim against MSD on this basis would be precluded by Ms. Waddell's contributory negligence.

Plaintiff's Contributory Negligence

Plaintiffs' claims are barred by Ms. Waddell's contributory negligence. It is a long-standing legal tenet that "[t]he law imposes upon a person *sui juris* the obligation to use ordinary care for his own protection, and the degree of such care should be commensurate with the danger to be avoided." *Rice v. Lumberton*, 235 N.C. 227, 236, 69 S.E.2d 543, 550 (1952). Where a person knows of or in the exercise of reasonable care, should be aware of a dangerous condition, and deliberately exposes themselves to that danger, that person is guilty of contributory negligence. *Taylor v. Walker*, 320 N.C. 729, 735, 360 S.E.2d 796, 800 (1987).

The facts in the case of *Grimsley v. Scott*, 213 N.C. 110, 195 S.E. 83 (1938), are virtually identical to those in the instant case. In *Grimsley*, the plaintiff was sitting on a sled with her young daughter in front of her, going down a steep incline, on slick ice. *Id.* at 112, 195 S.E. at 84. The defendant's vehicle was parked on a street 50 to 100 feet away and could be seen by the plaintiff. *Id.* There was a large street light over the street. *Id.* The plaintiff had a clear passageway on the street of 20 feet. The plaintiff went down the street at a rapid speed, hit the rear end of the defendant's car, and was injured. *Id.* Our Supreme Court held that the plaintiff's claims against the defendant were barred by contributory negligence. *Id.* at 113, 195 S.E. at 85.

In the instant case, as stated *supra*, the manhole was an open and obvious condition in Ms. Waddell's backyard. The manhole was stationary, positioned at the bottom of a 100-150 foot hill, and was clearly visible from the Waddells' back porch. The manhole was approximately one and a half feet above ground on the uphill side and two and a half feet above the ground on the downhill side. The manhole was four feet in diameter.

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Further, Ms. Waddell disregarded the warning³ written on the inner tube and chose to sled down the hill. Ms. Waddell knew that the manhole was at the bottom of the hill and that the inner tube was impossible to steer once it was in motion. As a result of her decision to sled down the hill, Ms. Waddell ran into the stationary manhole and subsequently died from her injuries.

This case is indistinguishable from *Grimsley* and based upon the rationale of that case, plaintiffs' claims against MSD and CDC are barred by Ms. Waddell's contributory negligence. Although plaintiffs correctly state that contributory negligence is not a bar to a plaintiff's recovery when the defendant's gross negligence, or willful or wanton conduct, is a proximate cause of the plaintiff's injuries, *Yancey v. Lea*, 354 N.C. 48, 51, 550 S.E.2d 155, 157 (2001), plaintiffs have failed to forecast any evidence that MSD and CDC were grossly negligent. The orders of the trial court are affirmed.

AFFIRMED.

Judges ELMORE and HUNTER, Jr. concur.

 STATE OF NORTH CAROLINA v. JIMMY RAY WILLIAMS

No. COA10-11

(Filed 7 September 2010)

Sexual Offenses— second-degree sexual offense—mentally disabled victim—sufficient evidence

The trial court did not err in denying defendant's motion to dismiss a charge of second-degree sexual offense because the State presented substantial evidence of all the elements of the offense, including that the victim was mentally disabled and that defendant knew or should reasonably have known that the victim was mentally disabled.

3. Warning, H-0! Attention Be aware of local rules and regulations regarding this product and its use. Also be familiar with rules of the product itself. Pay close attention and watch out for other riders. You cannot steer once in motion. For maximum safety, always wear protective equipment such as [a] helmet, goggles and gloves when riding. . . . Product may develop high speeds under certain snow conditions. *Always scout terrains for obstacles and sudden drops.* Never use product in a standing position. Failure to follow this rule may result in paralysis or other serious injury." (Emphasis added).

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Appeal by defendant from judgment entered 1 July 2009 by Judge William Z. Wood, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 19 August 2010.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Sarah Y. Meacham, for the State.

Daniel J. Clifton, for defendant-appellant.

JACKSON, Judge.

Defendant Jimmy Ray Williams appeals from a judgment entered 1 July 2009 upon a jury's verdict finding him guilty of second-degree sexual offense and crime against nature. For the reasons set forth below, we hold no error.

In May 2008, William Ray Epperson ("Epperson") had been living with his mother for forty-seven years. Epperson has an I.Q. of fifty-eight and is considered to have mild mental retardation. Epperson needs daily assistance with household chores and receives monthly disability checks for mental retardation. Defendant is Epperson's mother's boyfriend and has known Epperson for many years. Defendant often spent time with the family and frequently stayed overnight at Epperson's mother's house.

Towards the end of May 2008, Epperson helped defendant move a refrigerator at defendant's trailer. Epperson testified that after he helped move the refrigerator, he went into the bathroom to put up a shower curtain, and then he went into the bedroom where defendant performed fellatio on him. Epperson testified that defendant asked "if he could suck [Epperson's] dick" and that defendant told Epperson "not to tell." Epperson testified that he told defendant "no" but defendant performed fellatio anyway. Epperson also testified as to another occasion at his mother's house where defendant came into Epperson's bedroom and began performing fellatio on Epperson. On that occasion, Epperson told defendant "no," and defendant stopped. Because Epperson's mother's house is in Surry County and the indictment only charges crimes alleged to have been committed in Forsyth County, we only are concerned with the incident that took place at defendant's trailer in Forsyth County. A few days after the incidents defendant told his mother what had happened. Epperson also told his sister, two step-brothers, and Detective A.W. Adkins ("Detective Adkins") about the incidents.

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On 22 September 2008, defendant was indicted on one count of second-degree sexual offense and one count of crime against nature. On 30 June 2009, a jury convicted defendant of both charges. On 1 July 2009, defendant was sentenced to sixty to eighty-one months imprisonment. Defendant appeals.

Defendant argues that the trial court erred in denying defendant's motion to dismiss the second-degree sexual offense at the end of all the evidence. We disagree.

We review the denial of a motion to dismiss *de novo*. *State v. Robledo*, 193 N.C. App. 521, 525, 668 S.E.2d 91, 94 (2008) (*citing State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007)). In order to survive a motion to dismiss, the State must have presented substantial evidence as to each essential element of the offense charged and as to defendant's identity as the perpetrator. *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002).

When ruling on a motion to dismiss for insufficient evidence, the trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor. Any contradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered. The trial court must decide only whether there is substantial evidence of each essential element of the offense charged and of the defendant[']s being the perpetrator of the offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. When the evidence raises no more than a suspicion of guilt, a motion to dismiss should be granted. However, so long as the evidence supports a reasonable inference of the defendant's guilt, a motion to dismiss is properly denied even though the evidence also permits a reasonable inference of the defendant's innocence.

State v. Miller, 363 N.C. 96, 98-99, 678 S.E.2d 592, 594 (2009) (internal citations and quotation marks omitted).

To support the charge of second-degree sexual offense, the State was required to present substantial evidence that the defendant (1) engaged in a sexual act; (2) with a person who is mentally disabled, mentally incapacitated, or physically helpless; and (3) knew or should reasonably have known that the other person is mentally disabled, mentally incapacitated, or physically helpless. N.C. Gen. Stat. § 14-27.5(a)(2) (2009). Defendant does not deny that he engaged in a

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sexual act with Epperson. However, defendant contends that there was insufficient evidence that Epperson is mentally disabled pursuant to North Carolina General Statutes, section 14-27.1(1), and insufficient evidence that defendant knew or should reasonably have known that Epperson was mentally disabled.

Defendant first contends that there was insufficient evidence that Epperson was mentally disabled pursuant to North Carolina General Statutes, section 14-27.1(1). We disagree.

North Carolina General Statutes, section 14-27.1(1) defines “mentally disabled” as:

(i) a victim who suffers from mental retardation, or (ii) a victim who suffers from a mental disorder, either of which temporarily or permanently renders the victim substantially incapable [(a)] of appraising the nature of his . . . conduct, or [(b)] of resisting . . . a sexual act, or [(c)] of communicating unwillingness to submit to . . . a sexual act.

N.C. Gen. Stat. § 14-27.1(1) (2009). “[O]ne who is ‘mentally [disabled]’ under the sex offense laws is ‘statutorily deemed incapable of consenting’ to intercourse or other sexual acts.” *State v. Washington*, 131 N.C. App. 156, 167, 506 S.E.2d 283, 290 (1998) (quoting *State v. Holden*, 338 N.C. 394, 406, 450 S.E.2d 878, 884 (1994)).

Defendant relies upon *State v. Oliver*, 85 N.C. App. 1, 354 S.E.2d 527 (1987), to support his argument that Epperson was able to appraise the nature of his conduct and communicate an unwillingness to receive oral sex, and therefore, was not “mentally disabled.” *Id.*, cert. denied, 320 N.C. 174, 358 S.E.2d 64, *supersedeas denied*, 320 N.C. 174, 358 S.E.2d 65 (1987). In *Oliver*, the victim was a sixteen-year-old who functioned at an eight-year-old level and had a full scale I.Q. of sixty-six or less. *Id.* at 4, 354 S.E.2d at 529. Expert testimony established that the victim in certain circumstances was capable of appraising the nature of her conduct. *Id.* at 18, 354 S.E.2d at 537. The victim also testified that she verbally protested the sexual abuse. *Id.* at 20, 354 S.E.2d at 538. Accordingly, we held that “the State’s evidence was not sufficient to show the victim was substantially incapable of ‘appraising the nature of . . . her conduct’ or ‘communicating unwillingness to submit to the . . . sexual act.’” *Id.* at 18, 354 S.E.2d at 537. However, based upon expert testimony that the victim would find it very difficult to disobey an authority figure, we also held that there was “sufficient evidence to support a finding that the victim was substantially incapable of ‘resisting the . . . sexual act.’” *Id.* Specifically, we ruled that

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the element of “substantially incapable of . . . resisting the . . . sexual act” is not negated by the victim’s ability to verbally protest or even to engage in some physical resistance of the abuse. The words “substantially incapable” show the Legislature’s intent to include within the definition of “mentally [disabled]” those persons who by reason of their mental retardation or disorder would give little or no physical resistance to a sexual act.

Id. at 20, 354 S.E.2d at 538. Accordingly, “[v]iewed in the light most favorable to the prosecution, we [found] the evidence sufficient to support the trial court’s denial of defendant[s] motion for nonsuit.” *Id.* at 20-21, 354 S.E.2d at 538.

In the case *sub judice*, both parties agreed that the evidence tended to show that Epperson was capable of appraising the nature of his conduct and of communicating an unwillingness to submit to a sexual act. The element at issue is whether Epperson was substantially capable of resisting a sexual act. Expert testimony showed that Epperson had a full scale I.Q. of fifty-eight, placing him in the range of mild mental retardation. The expert witness testified that Epperson “had difficulty expressing himself verbally”; “was able to read very simple words like go, cat, [and] in”; “was able to solve very simple addition and subtraction problems”; and “had difficulty answering questions about social abilities, every-day-life tasks.” Epperson’s sister testified that Epperson needed daily assistance with “[c]ooking, washing his clothes, [and] making sure he brushed his teeth.” During trial, the following exchange occurred:

[Defendant’s counsel]: [D]id [defendant] ask you if he could suck your dick?

[Epperson]: Yeah.

[Defendant’s counsel]: And what did you say when he asked you that?

[Epperson]: He told me not to tell at the trailer. That’s what he told me.

[Defendant’s counsel]: Well, did he ask you—well, what did [you] say when he asked you that question?

[Epperson]: I told him no.

[Defendant’s counsel]: And then what did he do?

[Epperson]: He suck[ed] it.

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Epperson testified that he did not want defendant to “suck [his] dick” and Epperson had also told Detective Adkins that he did not want the incident to take place. In the light most favorable to the State, notwithstanding Epperson’s communication of his unwillingness to receive oral sex, defendant completed the sexual act, allowing an inference that Epperson was unable to resist the sexual act. As a “person who by reason of [his] mental retardation or disorder would give little or no physical resistance to a sexual act,” Epperson falls within the Legislature’s definition of “mentally [disabled].” *See Oliver*, 85 N.C. App. at 20, 354 S.E.2d at 538. When taken in the light most favorable to the State, a reasonable juror could find that Epperson was substantially incapable of resisting a sexual act and was “mentally disabled” pursuant to North Carolina General Statutes, section 14-27.1(1). Accordingly, defendant’s first argument is without merit.

Defendant next contends that there was insufficient evidence that defendant knew or reasonably should have known that Epperson was mentally disabled because defendant is unable to discern a difference in mental capability between Epperson and himself. We disagree.

In support of this contention, defendant relies on the following testimony by expert witness Dr. Ashley King (“Dr. King”):

[Defendant’s counsel]: [D]id [defendant] make any comparisons between he [sic] and Mr. Epperson?

[Dr. King]: Yes, he did.

[Defendant’s counsel]: What did he say that Mr. Epperson was able to do?

[Dr. King]: Let’s see. He said that he could read, work in the yard, clean the house and fix a lawnmower. And he said, quote, “he seemed just like me, but he could read and write,” end quote.

[Defendant’s counsel]: So based upon those statements that were made by [defendant] to, would you think he was able to discern a difference between him and Mr. Epperson?

[Dr. King]: I wouldn’t base that . . . making that discernment on those statements or on any single piece of data.

[Defendant’s counsel]: Well, based on all of your data then, not just that one particular statement, but based on all of your data, do you think that he would be able to discern the difference between he [sic] and Mr. Epperson?

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[Dr. King]: I think that it might be difficult for him. I mean, he might—he might notice that there were things about Mr. Epperson that were different, like him repeating things over and over, but I don't know that he would conclude from that that Mr. Epperson was mentally retarded.

Dr. King testified that based upon her evaluation, her diagnosis was that he had “borderline intelligence,” placing him “between below average and mild mental retardation.” Dr. King testified that “[she] wasn't able to successfully test [defendant]” because she thought that “[defendant] was trying to . . . seem a little bit less intelligent than he actually is during [their] interview.” Dr. King testified that defendant was “malingering . . . so much so that [she] could not use the tests at all[;] in fact, [she] had to discard the whole process.” Dr. King also testified that defendant's 2004 test result of a full scale I.Q. of fifty-four was inaccurate because defendant was able to drive a forklift and a car, tasks that she would expect someone with an I.Q. between seventy and eighty to perform. Dr. King agreed with the statement that, at the time of the 2004 test, defendant had a “huge reason to mangle because the result could be . . . a monthly [disability] check.” Defendant also knew that Dr. King's evaluation was in preparation for her testimony at defendant's trial. When asked whether “[defendant] would . . . be in a position to recognize some mental deficits in talking with someone who, in fact, has a mental deficit,” Dr. King responded, “I would think it would depend upon how pronounced [the mental deficits] were and how different they were from what [defendant's] idea of normal was.”

In contrast, the State's evidence tended to show that Epperson displayed many signs of mental disability. Detective Adkins testified that, within three minutes of talking with Epperson, “it became clearly obvious . . . that [Epperson] had some deficits.” However, Detective Adkins testified that, during an interview with defendant later on that same day, “[d]efendant appeared [to be] a normal and healthy adult male. And the only deficits that [Detective Adkins] determined in conducting [the] interview was his inability to read or write.” Evidence also showed that defendant had a driver's license, held regular jobs, took care of Epperson's mother when she was sick by cooking meals and making sure she took her medication, could connect a VCR, and could read “somewhat.” Epperson, on the other hand, could not drive, never has held a regular job, only could cook food in a microwave, had to be reminded to brush his teeth, did not know how to connect a VCR, and could not read.

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Moreover, defendant had sufficient opportunity to get to know Epperson as more than just a casual observer. Prior to the charges against defendant, Epperson lived with his mother for forty-seven years. During the thirteen years defendant dated Epperson's mother, defendant spent one or two nights a week at Epperson's mother's house and "hung out with the family." Therefore, defendant had ample opportunity, or reasonably should have discovered, Epperson's mental disability. Defendant's offer to Epperson of a Pepsi or \$10.00 to have oral sex is a strong indication that defendant actually did know that Epperson functioned at the level of a child or person with a mental disability. Taken in the light most favorable to the State, a reasonable juror could find that defendant knew or should have reasonably known that Epperson was mentally disabled. Accordingly, this argument fails. We hold that there was sufficient evidence to support the trial court's denial of defendant's motion to dismiss.

For the foregoing reasons, we hold no error.

No Error.

Judges GEER and BEASLEY concur.

TAREN DEVON HAYNIE, PLAINTIFF v. DEON LAMONT COBB AND ROBERT F. JONES,
INDIVIDUALLY AND D/B/A JONES CONSTRUCTION COMPANY AND PETE
JONES CONSTRUCTION COMPANY, DEFENDANTS

No. COA09-1384

(Filed 7 September 2010)

1. Appeal and Error— preservation of issues—failure to appeal issue—failure to file assignment of error

A motion in the Court of Appeals to strike defendant Cobb's brief and reply brief was granted where defendant Cobb did not file a notice of appeal regarding the alleged error nor assignments of error, and the case did not qualify for one of the four situations when a reply brief is considered.

2. Appeal and Error— interlocutory order—risk of inconsistent verdict

In an action arising from a collision between a truck and a moped, an appeal from the dismissal of plaintiff's negligent entrustment claim was from an interlocutory order because a

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negligence claim survived, but was considered because there was the possibility of inconsistent verdicts.

3. Pleadings— substance of claim—negligent entrustment

The trial court erred by dismissing a claim for negligent entrustment where plaintiff moved to amend his complaint to add that claim, the amendment was never ruled upon, plaintiff took a voluntary dismissal, and plaintiff refiled a complaint that included the negligent entrustment claim. Plaintiff's original complaint alleged the elements necessary to put defendant on notice of the negligent entrustment claim.

Appeal by plaintiff from order entered 19 June 2009 by Judge Ronald E. Spivey in Superior Court, Forsyth County. Heard in the Court of Appeals 11 March 2010.

Donald R. Buie, for plaintiff-appellant.

Horton & Henry, P.L.L.C., by Katherine Flynn Henry, for defendant-appellee Robert F. Jones, individually and d/b/a Jones Construction Company and Pete Jones Construction Company.

Burton & Sue, L.L.P., by Stephanie W. Anderson and Andrea Dancy Harrell, for defendant-appellee.

STROUD, Judge.

Defendant Robert F. Jones d/b/a Jones Construction Company and Pete Jones Construction Company filed a motion to dismiss which the trial court granted as to one of plaintiff's claims. As the dismissed claim was alleged in plaintiff's complaint, we reverse and remand.

I. Background

On 12 January 2007, plaintiff filed a complaint ("2007 complaint") against defendants. On 24 March 2008, plaintiff filed a motion to amend his complaint. From the record before us, it appears that the trial court never ruled on plaintiff's motion to amend the 2007 complaint. On 25 April 2008, plaintiff voluntarily dismissed his action against defendants without prejudice.

On 3 April 2009, plaintiff re-filed a complaint ("2009 complaint") against defendants for negligence, negligent entrustment, and punitive damages. Plaintiff alleged that defendant Deon Cobb was driving

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a truck owned by defendant Robert F. Jones¹ d/b/a Jones Construction Company and Pete Jones Construction Company (“Jones”) and that defendant Cobb drove the truck negligently and collided with plaintiff’s moped, resulting in bodily injuries to plaintiff. On 21 April 2009, defendant Jones filed a motion to dismiss pursuant to North Carolina Rule of Civil Procedure 12(b)(6). The trial court granted defendant Jones’ motion as to the negligent entrustment claim. Plaintiff appeals.

II. Motion to Strike

[1] We first note defendant Jones filed a motion to strike defendant Cobb’s brief and reply brief. In defendant Cobb’s brief, he argues that the trial court committed reversible error. However, defendant Cobb did not file a notice of appeal regarding the alleged error nor did defendant Cobb file any assignments of error. As defendant Cobb failed to follow proper procedure for an appeal, we will not consider his arguments on appeal. *Harlee v. Harlee*, 151 N.C. App. 40, 51, 565 S.E.2d 678, 684 (2002) (“[T]he proper procedure for presenting alleged errors that purport to show that the judgment was erroneously entered and that an altogether different kind of judgment should have been entered is a cross-appeal.” (citations omitted)); *see also* N.C.R. App. P. 28(c) (allowing for appellee to raise additional questions without filing a notice of appeal or without assignments of error in certain situations not applicable to the present case). Also, because defendant Cobb does not qualify for one of the four situations when we consider a reply brief, we will not consider his reply brief on appeal. *See* N.C.R. App. P. 28(h). Due to procedural violations, defendant Jones’ motion to strike defendant Cobb’s brief is granted to the extent that Cobb’s brief addresses issues which were not properly raised on appeal and the motion to strike is granted as to defendant Cobb’s reply brief in its entirety.

III. Interlocutory Appeal

[2] Plaintiff appeals from a trial court order which dismissed his negligent entrustment claim. Plaintiff’s claim for negligence is still pending; there-

1. From the record before us it appears that Mr. Jones is a sole proprietor doing business as “Jones Construction Company and Pete Jones Construction Company.” The complaint does not allege that Jones Construction Company and Pete Jones Construction Company are legally incorporated, and the record contains no indication that Jones Construction Company and Pete Jones Construction Company are separate legal entities from Mr. Jones which would require service or notice separately from Mr. Jones. *See Faber Indus., Ltd. v. Witek*, 126 N.C. App. 86, 87, 483 S.E.2d 443, 444-45 (1997) (Use of the words “doing business as” does not create an entity distinct from the individual.). Thus, there are only two defendants in this case: Mr. Cobb and Mr. Jones.

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fore, plaintiff's appeal is interlocutory. *See Brewer v. Brewer*, 139 N.C. App. 222, 227, 533 S.E.2d 541, 546 (2000) ("An interlocutory order is one that does not determine the issues, but directs some further proceeding preliminary to a final decree." (citation and quotation marks omitted)). "An interlocutory order is generally not immediately appealable." *Duval v. OM Hospitality, LLC*, 186 N.C. App. 390, 392, 651 S.E.2d 261, 263 (2007) (citation omitted).

Nonetheless, in two instances a party is permitted to appeal interlocutory orders. First, a party is permitted to appeal from an interlocutory order when the trial court enters a final judgment as to one or more but fewer than all of the claims or parties and the trial court certifies in the judgment that there is no just reason to delay the appeal. Second, a party is permitted to appeal from an interlocutory order when the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits. Under either of these two circumstances, it is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal and our Court's responsibility to review those grounds.

Jeffreys v. Raleigh Oaks Joint Venture, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994) (citations, quotation marks, and ellipses omitted).

In *Liggett Group v. Sunas*, this Court stated,

Regarding the second, it has been frequently noted the substantial right test is much more easily stated than applied. There are few general principles governing what constitutes a substantial right and thus it is usually necessary to consider the particular facts of each case and the procedural context in which the interlocutory decree was entered. A substantial right, however, is considered affected if there are overlapping factual issues between the claim determined and any claims which have not yet been determined because such overlap creates the potential for inconsistent verdicts resulting from two trials on the same factual issues.

113 N.C. App. 19, 24, 437 S.E.2d 674, 677 (1993) (citations and quotation marks omitted).

Here, plaintiff argues the trial court order affects a substantial right. Plaintiff claims that if this Court were not to hear his appeal, he may be subject to inconsistent verdicts:

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The liability issues that arise in this case are such that facts and circumstances considered to determine the issue of negligence on Defendant Cobb would be the same facts and circumstances considered by a jury to determine the issue of whether Defendant Jones is liable for negligent entrustment. A second jury would have to decide the negligence of Defendant Cobb prior to determining if Defendant Jones was negligent in entrusting the pick up truck to Defendant Cobb. This procedure risks the possibility of inconsistent verdicts, in that the first jury could find Defendant Cobb negligent in the underlying accident and the second jury could find him not negligent. The facts and circumstances surrounding the accident and the proof necessary to prove Defendant Cobb negligent are also the same facts and circumstances that will be considered by a jury on the negligent {entrustment claim.

We agree with plaintiff's contentions. It is possible, if we reject plaintiff's appeal, that plaintiff could proceed with his trial against defendant Cobb and receive a monetary award. If plaintiff then appealed his motion to dismiss and we reversed, plaintiff would then need to proceed to trial with defendant Jones based on the facts as presented in the first trial. In this second trial, a jury could find that defendant Cobb was not negligent. As plaintiff could be subjected to inconsistent verdicts, we conclude that a substantial right has been affected and will consider plaintiff's appeal.

[3]

IV. Motion to Dismiss

A. Standard of Review

When ruling upon a 12(b)(6) motion to dismiss, a trial court must determine as a matter of law whether the allegations in the complaint, taken as true, state a claim for relief under some legal theory. On appeal of a 12(b)(6) motion to dismiss for failure to state a claim, our Court conducts a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct.

Page v. Lexington Ins. Co., 177 N.C. App. 246, 248, 628 S.E.2d 427, 428 (2006) (citations, quotation marks, and brackets omitted).

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B. Negligent Entrustment

Plaintiff contends that

the trial court's Rule 12(b)(6) dismissal order was improper where plaintiff's re-filed complaint was filed within one year of plaintiff's voluntary dismissal without prejudice and the re-filed complaint raised no new claim but did expand on the allegations of negligent entrustment alleged in the original complaint[.]

(Original in all caps.) Plaintiff argues that his negligent entrustment claim was part of his 2007 complaint and thus he can reassert that claim in his 2009 complaint.

Plaintiff directs our attention to paragraph 7 of his 2007 complaint as evidence that he had alleged negligent entrustment. Paragraph 7 provides: "Defendant Cobb was operating the vehicle as the agent, employee or servant of Defendant Jones and/or with the express or implied permission and consent of Defendant Jones who knew or should have known of Defendant Cobb's propensity to drive while impaired."

Rule 41(a) of our Rules of Civil Procedure provides that an action or any claim therein may be dismissed by the plaintiff without order of court . . . Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice . . . If an action commenced within the time prescribed therfor[e], or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal . . .

N.C. Gen. Stat. § 1A-1, Rule 41(a) (emphasis added).

A pleading adequately sets forth a claim for relief if it contains:

- (1) A short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief, and
- (2) a demand for judgment for the relief to which he deems himself entitled.

N.C. Gen. Stat. § 1A-1, Rule 8(a). "The general standard for civil pleadings in North Carolina is notice pleading. Pleadings should be construed

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liberally and are sufficient if they give notice of the events and transactions and allow the adverse party to understand the nature of the claim and to prepare for trial.” *Murdock v. Chatham County*, — N.C. App. —, —, 679 S.E.2d 850, 855 (2009) (citations and quotation marks omitted), *disc. review denied*, 363 N.C. 806, 690 S.E.2d 705 (2010).

The labels as to legal theories which plaintiff gave his claims in the 2007 complaint are not controlling:

[W]hen the allegations in the complaint give sufficient notice of the wrong complained of an incorrect choice of legal theory should not result in dismissal of the claim if the allegations are sufficient to state a claim under some legal theory. . . . In order to survive a motion to dismiss, however, the allegations of a mislabeled claim must reveal that plaintiff has properly stated a claim under a different legal theory.

See Stanback v. Stanback, 297 N.C. 181, 202, 254 S.E.2d 611, 625 (1979). Negligent entrustment arises when “the owner of an automobile entrusts its operation to a person whom he knows, or by the exercise of due care should have known, to be an incompetent or reckless driver who is likely to cause injury to others in its use.” *Dwyer v. Margono*, 128 N.C. App. 122, 127, 493 S.E.2d 763, 765 (1997) (citation and quotation marks omitted), *disc. review denied*, 347 N.C. 670, 500 S.E.2d 85 (1998).

Defendant Jones argues that the 2007 complaint did not state a claim for negligent entrustment, based upon plaintiff’s motion to amend to add this claim. Basically, defendant Jones argues that if plaintiff needed to add a claim for negligent entrustment to the 2007 complaint, plaintiff must necessarily not have stated this claim in the original 2007 complaint. Plaintiff’s motion to amend states that he wants to amend his 2007 complaint because “there are additional theories of negligence against Defendant Jones, namely negligent entrustment[.]” Defendant Jones argues that he was only put on notice for the claim of vicarious liability for defendant Cobb’s allegedly negligent driving.

Defendant Jones’ argument fails because neither the labels or lack thereof as to legal theories used in plaintiff’s 2007 complaint nor the motion to amend the 2007 complaint are controlling. *See Stanback* at 202, 254 S.E.2d at 625. Plaintiff alleged in his 2007 complaint that defendant Jones entrusted his vehicle to defendant Cobb, whom defendant Jones should have known had a “propensity to drive while impaired.” Thus, plaintiff did allege the necessary elements to put defendant Jones on notice of the claim of negligent entrustment,

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even if plaintiff mislabeled or failed to label the claim. *See id.*; *Murdock* at —, 679 S.E.2d at 855; *Dwyer* at 127, 493 S.E.2d at 765.

The only relevant question as to this issue is whether plaintiff's 2009 complaint is "based on the same claim[s]" as his 2007 complaint. N.C. Gen. Stat. § 1A-1, Rule 41(a). Therefore, the question to consider as to plaintiff's 2007 complaint is whether it "give[s] notice of the events and transactions and allow[s] the adverse party to understand the nature of the claim and to prepare for trial." *Murdock* at —, 679 S.E.2d at 855. This inquiry does not involve later statements by plaintiff as to plaintiff's intent in filing his 2007 complaint. In other words, we cannot consider what plaintiff intended to allege in his complaint but rather what he *actually* alleged in the complaint. In the 2007 complaint, plaintiff alleged all of the necessary elements for a claim of negligent entrustment, *see Dwyer* at 127, 493 S.E.2d at 765, and therefore defendant Jones was put on notice of such a claim. *See Murdock* at —, 679 S.E.2d at 855.

Although it may seem incongruous that we have concluded that plaintiff had properly pled a claim when plaintiff himself alleged he wanted to add it as an additional claim, when we consider the question of what claims were alleged, the law only allows us to consider the pleadings. *See Murdock* at —, 679 S.E.2d at 855; *see generally* N.C. Gen. Stat. § 1A-1, Rule 8(a). Accordingly, we reverse the order of the trial court dismissing plaintiff's claim for negligent entrustment. As we are reversing the trial court's order, we need not address plaintiff's other issue on appeal.

V. Conclusion

As plaintiff's 2007 complaint plainly alleged the elements of negligent entrustment, the trial court should not have granted defendant Jones' motion to dismiss the claim of negligent entrustment. Therefore, we reverse.

REVERSED.

Judges ELMORE and JACKSON concur.

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SMITH ARCHITECTURAL METALS, LLC PLAINTIFF v. AMERICAN RAILING SYSTEMS, INC. DEFENDANT AND THIRD PARTY PLAINTIFF v. FIRST LINE COATINGS, INC., THIRD PARTY DEFENDANT

No. COA09-1620

(Filed 7 September 2010)

1. Appeal and Error—interlocutory order—personal jurisdiction

An appeal from a dismissal for lack of personal jurisdiction was from an interlocutory order but was heard because defendant properly proceeded under N.C.G.S. § 1-277(b).

2. Jurisdiction— minimum contacts—attempts to resolve problem without litigation

Defendant First Line did not possess sufficient minimum contacts with North Carolina for personal jurisdiction where it had no contact with North Carolina prior to an email to a North Carolina corporation (Smith Metals) detailing its efforts to assess and remedy a problem on railings it had painted for another out-of-state corporation (American Railing). It would “offend traditional notions of fair play and substantial justice” to allow our courts to obtain personal jurisdiction solely on the basis of sincere attempts to remedy the situation without resort to litigation.

Appeal by third party defendant from order entered 17 September 2009 by Judge Carl R. Fox in Alamance County Superior Court. Heard in the Court of Appeals 12 May 2010.

Patterson Dilthey, LLP, by Christopher J. Derrenbacher and Eric G. Sauls, for third party plaintiff-appellee.

Vernon, Vernon, Wooten, Brown, Andrews & Garrett, P.A., by Benjamin D. Overby, for third party defendant-appellant.

HUNTER, Robert C., Judge.

Third party defendant First Line Coatings, Inc. (“First Line”) appeals from an order entered 17 September 2009 denying First Line’s motion to dismiss for lack of personal jurisdiction pursuant to Rule 12(b)(2) of the North Carolina Rules of Civil Procedure. After careful review, we reverse the trial court’s order.

SMITH ARCHITECTURAL METALS, LLC v. AM. RAILING SYS. INC.

[207 N.C. App. 151 (2010)]

Background

The record tends to establish the following facts: In March 2007, plaintiff, Smith Architectural Metals, LLC (“Smith Metals”), a North Carolina corporation, contracted with defendant and third party plaintiff, American Railing Systems, Inc. (“American Railing”), a Pennsylvania corporation, to supply railing materials to Smith Metals. American Railing then subcontracted with First Line, a Pennsylvania corporation, to apply a “powder coating” to the railings. First Line applied the coating and returned the railings to American Railing who then shipped the finished product to Smith Metals in North Carolina. Smith Metals then installed the railings in Durham, North Carolina.

Within approximately three months after installation of the railings, the coating on the railings “began to crack, flake, peel off and generally fail[.]” Smith Metals notified American Railing of the coating defect, and American Railing informed First Line that there was a problem with the coating it applied. On 27 February 2008, Brian Brocious (“Brocious”), president of First Line, emailed a representative of Smith Metals and informed him that he was making arrangements to come to North Carolina on 3 March 2008 to “assess the situation and fix the problem ASAP.” It is unclear whether Brocious ever traveled to North Carolina. On 31 March 2008, Brocious emailed Donald Powell (“Powell”) of Smith Metals to inform him that a local contractor, Allen Wells (“Wells”), would be coming to inspect the railings either that day or the following day. Brocious further stated in the email: “We have a joint effort between myself, Cardinal Paints, and Allen [E]lectrostatic [C]ompany” to assess the railing and ascertain the needed repairs. According to Brocious, “Cardinal Paints is working on a[n] exact match to fix paint problems.” Brocious emailed Powell again on 9 April 2008 to inform him that Wells would be arriving that Friday to assess the situation. On 16 April 2008, First Line representative Sherrie Neely sent a fax to Wells in North Carolina asking Wells where the paint needed to be shipped.

The record does not establish the outcome of the repair attempts. First Line issued a check in the amount of \$1,400.00 to Smith Metals on 14 May 2008 and another check in the amount of \$3,400.00 on 22 May 2008. First Line sent a fax to Smith Metals on 22 May 2008 indicating that the \$3,400.00 check had been sent. On 2 and 3 June 2008, Brocious sent emails to “Steve” with Smith Metals indicating a desire to reimburse Smith Metals for the railings. On 1 July 2008, Brocious sent Steve an email requesting “18 to 20 months to pay you back on this \$43,176.88[.]”

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On or about 6 November 2008, Smith Metals filed a complaint in Alamance County Superior Court against American Railing alleging breach of contract and negligence. On or about 11 January 2009, American Railing filed an answer and third party complaint against First Line alleging breach of contract and negligence. On or about 6 March 2009, First Line filed a motion to dismiss American Railing's third party complaint on the basis that the trial court lacked personal jurisdiction over First Line. On 14 September 2009, the trial court heard arguments on the motion. On 17 September 2009, the trial court filed an order denying First Line's motion to dismiss. First Line timely appealed to this Court.

Interlocutory Nature of Appeal

[1] "Interlocutory orders are those made during the pendency of an action which do not dispose of the case, but instead leave it for further action by the trial court in order to settle and determine the entire controversy." *Carriker v. Carriker*, 350 N.C. 71, 73, 511 S.E.2d 2, 4 (1999). "As a general rule, interlocutory orders are not immediately appealable." *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009). However, First Line properly proceeds pursuant to N.C. Gen. Stat. § 1-277(b) (2009), which provides a right of immediate appeal where there has been "an adverse ruling as to the jurisdiction of the court over the person or property of the defendant . . ." Accordingly, we will address the merits of this interlocutory appeal.

Discussion

[2] The sole issue on appeal is whether the trial court has personal jurisdiction over First Line. We hold that it does not and that the motion to dismiss was, therefore, improperly denied.

Generally, "[w]hen this Court reviews a decision as to personal jurisdiction, it considers only whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court." *Eaker v. Gower*, 189 N.C. App. 770, 773, 659 S.E.2d 29, 32 (2008) (quoting *Banc of Am. Secs. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 694, 611 S.E.2d 179, 183 (2005)). The trial court in this case did not make findings of fact in its order. "[A]bsent a request by the parties . . . the trial court is not required to find the facts upon which its ruling is based." *A.R. Haire, Inc. v. St. Denis*, 176 N.C. App. 255, 258, 625 S.E.2d 894, 898 (2006). "In such case, it will be presumed that the judge, upon proper evidence, found facts sufficient to support his judgment." *City of*

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Salisbury v. Kirk Realty Co., Inc., 48 N.C. App. 427, 429, 268 S.E.2d 873, 875 (1980) (quoting *Haiduwen v. Cooper*, 23 N.C. App. 67, 69, 208 S.E.2d 223, 225 (1974)). “Therefore, we must review the record to determine whether it contains competent evidence to support the trial court’s presumed findings to support its ruling that Defendant[] w[as] subject to personal jurisdiction in the courts of this state.” *A.R. Haire*, 176 N.C. App. at 258-59, 625 S.E.2d at 898.

A two-step analysis applies when determining whether a court may exercise in personam jurisdiction over a non-resident defendant. First, is there statutory authority that confers jurisdiction on the court? This is determined by looking at North Carolina’s “long arm” statute, section 1-75.4 of the North Carolina General Statutes. Second, if statutory authority confers in personam jurisdiction over the defendant, does the exercise of in personam jurisdiction violate the defendant’s due process rights?

Id. at 259, 625 S.E.2d at 898-99.

First Line does not argue that the long arm statute does not confer personal jurisdiction over it. Consequently, we will not discuss the application of the statute to these facts. Our analysis is therefore limited to determining whether hailing First Line into a North Carolina court violates First Line’s right to due process.

To satisfy the requirements of the due process clause, there must exist certain minimum contacts [between the non-resident defendant and the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. There must be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. In determining minimum contacts, the court looks at several factors, including: (1) the quantity of the contacts; (2) the nature and quality of the contacts; (3) the source and connection of the cause of action with those contacts; (4) the interest of the forum state; and (5) the convenience to the parties. These factors are not to be applied mechanically; rather, the court must weigh the factors and determine what is fair and reasonable to both parties. No single factor controls; rather, all factors must be weighed in light of fundamental fairness and the circumstances of the case.

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Id. at 259-60, 625 S.E.2d at 899 (internal citations and quotation marks omitted). Upon review of the record, we hold that First Line did not possess sufficient minimum contacts within North Carolina.

North Carolina has long had a policy favoring the compromise of disputes without resort to litigation. *See, e.g., Moore v. Greene*, 237 N.C. 614, 616, 75 S.E.2d 649, 650 (1953) (“The policy of the law favors the settlement of business disputes.”); *see also Olive v. Williams*, 42 N.C. App. 380, 389, 257 S.E.2d 90, 96-97 (1979) (“[C]ontingency fee contracts providing against compromise or settlement of a case without the attorney’s consent often have been declared as void against public policy for inhibiting compromise or settlement.”). The “sound public policy encouraging the settlement of disputes out of court” has led to the rule excluding the admission of evidence of such compromises, *Rowe v. Rowe*, 305 N.C. 177, 186, 287 S.E.2d 840, 846 (1982), because “[i]f every offer to buy peace could be used as evidence against [the party] who presents it, many settlements would be prevented, and unnecessary litigation would be produced and prolonged.” *Moffitt-West Drug Co. v. Byrd*, 92 F. 290, 292 (8th Cir. Indian Terr. 1899); accord, *Hammond Packing Co. v. Dickey*, 183 F. 977, 978 (8th Cir. 1911). Likewise, if every offer to compromise and promote peace is used as a contact to establish personal jurisdiction in this State over the party who presents it, “many settlements would be prevented, and unnecessary litigation would be produced and prolonged.” *Hammond Packing Co.*, 183 F. at 978.

The record in this case indicates that First Line had no contact with North Carolina prior to Brocious’s email to Smith Metals informing its representatives of First Line’s intention to “assess the situation and fix the problem ASAP.” First Line’s emails and fax transmissions to Smith Metals detail First Line’s efforts to remedy the problem with the railings. First Line also issued two checks to Smith Metals, sent emails indicating First Line’s desire to reimburse Smith Metals for the railings, and sent an email requesting “18 to 20 months” to pay Smith Metals back.

None of these activities indicate that First Line “purposefully avail[ed]” itself of the “benefits and protections” of the laws of North Carolina sufficient to establish personal jurisdiction over it. *Hanson v. Denckla*, 357 U.S. 235, 253, 2 L. Ed. 2d 1283, 1298 (1958). Instead, these activities establish that First Line’s sole purpose for these contacts was to attempt to resolve the problem without resort to litigation. It would “offend ‘traditional notions of fair play and sub-

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stantial justice[,]’ ” *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102 (1945), to penalize First Line for becoming “intricately involved in the resolution of the problem” by allowing our courts to obtain personal jurisdiction over First Line solely on the basis of First Line’s sincere attempts to remedy the situation without resort to litigation. See *CEM Corp. v. Pers. Chemistry*, 55 Fed. Appx. 621, 625-26 (4th Cir. 2003) (“It would be very odd to permit a plaintiff to obtain personal jurisdiction over a defendant on the basis of the defendant’s attempts to settle litigation begun by the plaintiff on the defendant’s home turf . . .”).

In *Conwed Corp. v. Nortene, S.A.*, 404 F. Supp. 497, 504 (D.C. Minn. 1975), a case relied upon by First Line, the federal district court held that the state of Minnesota did not have personal jurisdiction over the defendant company because the defendant made contact with the plaintiff only after a complaint was filed in an attempt to settle the lawsuit. American Railing argues that in the present case, First Line made contact with Smith Metals *before* a complaint was filed. We find that to be a distinction without a difference. Based on this State’s sound public policy of encouraging settlement, in determining whether minimum contacts exist, we discern no meaningful distinction between offers to correct a problem pursuant to cooperative negotiations before the filing of a complaint and offers to settle once a lawsuit has begun. In sum, because First Line had no contact with Smith Metals until First Line attempted to correct a defect in its product—a product which was manufactured in Pennsylvania at the request of American Railing, a Pennsylvania corporation—we are compelled to hold that the courts of North Carolina do not have personal jurisdiction over First Line.

Conclusion

Based on the foregoing discussion, we hold that the trial court erroneously denied First Line’s motion to dismiss pursuant to Rule 12(b)(2), and, consequently, we reverse and remand this case to the trial court for further proceedings not inconsistent with this opinion.

Reverse and Remand.

Judges GEER and STEPHENS concur.

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HORACE K. POPE, JR., EMPLOYEE, PLAINTIFF, APPELLEE v. JOHNS MANVILLE,
EMPLOYER, ST. PAUL TRAVELERS INDEMNITY COMPANY, CARRIER-DEFEND-
ANT, DEFENDANTS-APPELLANTS

No. COA09-281-2

(Filed 21 September 2010)

**1. Workers' Compensation— average weekly wage—remanded—
findings of fact to support recalculation**

After considering defendants' petition for rehearing and additional briefs submitted in a workers' compensation case stemming from plaintiff's exposure to asbestos, the Court of Appeals concluded that the Industrial Commission failed to make adequate findings of fact and conclusions of law concerning the calculation of plaintiff's average weekly wage. The case was remanded to the Industrial Commission for recalculation of plaintiff's average weekly wage and appropriate findings of fact to support that recalculation.

Appeal by defendants from Opinion and Award entered 7 November 2008 by the North Carolina Industrial Commission Heard in the Court of Appeals 16 September 2009, with petition for rehearing having been granted 10 March 2010.

Wallace and Graham, P.A., by Michael B. Pross, and R. James Lore, for Plaintiff-Appellee.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Deepa P. Tungare and Jeffrey A. Kadis, for Defendant-Appellant.

Smith Moore Leatherwood LLP, by Jeri L. Whitfield and Elizabeth Brooks Scherer, for the North Carolina Association of Defense Attorneys, Amicus Curiae.

ERVIN, Judge.

Defendants Johns Manville and Travelers Indemnity Company appeal from an Opinion and Award entered by the North Carolina Industrial Commission on 7 November 2008, in which the Commission concluded that Plaintiff Horace Pope had been exposed to asbestos during his employment with Defendant Johns Manville; that Plaintiff had contracted asbestosis; that Plaintiff was disabled; and that Plaintiff should be awarded \$399.06 per week in disability benefits, medical expenses, and attorneys' fees. On 19 January 2010, this Court filed an opinion in *Pope v. Johns Manville*, N.C. App. —, — S.E.2d

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—, 2010 N.C. App. LEXIS 75 (Jan. 19, 2010) (unpublished), in which we affirmed the Commission’s Opinion and Award in its entirety.

On 23 February 2010, Defendants filed a petition for rehearing pursuant to N.C.R. App. P. 31. In their rehearing petition, Defendants contended that we erred in our original opinion by upholding the Commission’s weekly benefit award because the Commission had erred in calculating Plaintiff’s average weekly wages. More particularly, Defendants asserted that this Court erred by (1) upholding the Commission’s calculation of Plaintiff’s weekly wages “under N.C. Gen. Stat. § 97-61.5 and case law under that statute, as opposed to N.C. Gen. Stat. § 97-54 and 97-64,” and by (2) upholding “a sweeping award of benefits by using greater wages from a different subsequent employment to calculate Plaintiff’s average weekly wage.” On 17 March 2010, we granted Defendants’ petition for the purpose of reconsidering our decision to affirm the Commission’s calculation of Plaintiff’s average weekly wage. After careful consideration of Defendants’ rehearing petition and the additional briefs which we requested in our order granting Defendants’ rehearing petition, we now conclude that the Commission erred in its determination of Plaintiff’s average weekly wage and remand this case to the Commission for further proceedings, including, if necessary, findings of fact and conclusions of law concerning whether, “for exceptional reasons,” the Commission is required to calculate Plaintiff’s average weekly wage by employing “such other method of computing average weekly wages . . . as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.” N.C. Gen. Stat. § 97-2(5) (2009). Except for our resolution of this issue, we adhere to the remainder of our previous opinion in this matter.

I. Factual and Procedural Background

The facts of this case are set out in our previous opinion, *Pope v. Johns Manville*, and we will not restate them in detail here. At the most basic level, the evidence received before the Commission tended to show that Plaintiff was 80 years old at the time of the Commission’s decision. Plaintiff had worked from 1 January 1949 to 1 January 1950 and from 1 August 1952 to 31 August 1968 at a Johns Manville facility in Marshville, North Carolina. During his employment at Johns Manville, Plaintiff worked in all areas of the facility without wearing breathing protective equipment. In the course of his employment at the Johns Manville plant, Plaintiff was exposed to asbestos

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fibers. Plaintiff stopped working at Johns Manville in August 1968. After leaving Johns Manville, Plaintiff worked for various employers until 1986, when he began raising turkeys on a full-time basis. Plaintiff worked as a self-employed turkey farmer from 1986 until his retirement in 2003, at which point he was 75 years old. In 2005, Plaintiff was diagnosed with asbestosis.

On 24 May 2005, Plaintiff filed an Industrial Commission Form 18 for the purpose of seeking workers compensation medical and disability benefits stemming from asbestosis. Plaintiff's claim was heard before a Deputy Commissioner, who awarded Plaintiff disability and medical benefits. Defendants appealed the Deputy Commissioner's Opinion and Award to the Full Commission. On 7 November 2008, the Commission entered an Opinion and Award that affirmed the Deputy Commissioner's decision. Defendants noted an appeal from the Commission's order to this Court.

On appeal, Defendants advanced several challenges to the lawfulness of the Commission's decision. First, Defendants argued that the Commission erred by finding and concluding that Plaintiff had contracted asbestosis. After carefully examining the record, we determined that the evidence supported the Commission's conclusion that Plaintiff suffered from asbestosis. Next, Defendants asserted that the Commission erred by considering the testimony of Dr. Jill Ohar on the grounds that Plaintiff had failed either to identify her as an expert witness prior to the hearing or to include her among the expert witnesses listed in a pre-trial agreement. In response, we concluded that Defendants were not entitled to relief on appeal as a result of the inclusion of Dr. Ohar's testimony in the record given that Defendants had been afforded ample opportunity to address the issues raised by Dr. Ohar's testimony and given that any error that the Commission might have committed in considering Dr. Ohar's testimony had been rendered harmless by the Commission's finding that, "[e]ven if Dr. Ohar's testimony were not considered pursuant to defendants' objection, the greater weight of the competent evidence showed that plaintiff contracted asbestosis." Thirdly, Defendants argued that the Commission erred by concluding that Plaintiff was disabled given that he had not been diagnosed with asbestosis when he stopped working in 2003. In rejecting Defendants' argument, we concluded that the Commission's findings were sufficient to support its conclusion that Plaintiff was permanently disabled and entitled to receive disability benefits.

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In their final challenge to the Commission's decision, Defendants argued that the Commission erroneously calculated Plaintiff's average weekly wage. In its Opinion and Award, the Commission established the amount of weekly disability payment to which Plaintiff was entitled based on the amount he earned as a turkey grower during the year immediately prior to his retirement. In support of their challenge to the Commission's decision with respect to this issue, Defendants asserted that:

The Industrial Commission's determination that Plaintiff's average weekly wage should be based upon earnings from 2003 is . . . flawed because in 2003 Plaintiff had not developed the disease. At the time of the alleged "diagnosis," Plaintiff's wages were zero, and, therefore, his loss of earning power was zero.

In other words, Defendants contended that, because Plaintiff had not been diagnosed with asbestosis until after his retirement, he was not entitled to any disability compensation whatsoever. However, "Defendant[s] cite[d] no authority for the proposition that a claimant cannot recover for an occupational disease if he has voluntarily retired prior to filing a claim, and long-established precedent to the contrary clearly establishes that a claimant is not barred from receiving workers' compensation benefits for an occupational disease solely because he or she was retired." *Austin v. Cont'l Gen. Tire*, 185 N.C. App. 488, 495, 648 S.E.2d 570, 575, *disc. review denied*, 361 N.C. 690, 652 S.E.2d 255 (2007) (*Austin II*). Alternatively, Defendants argued that:

. . . N.C. Gen. Stat. § 97-54 references the wages that an employee was earning at the time of [his] "last injurious exposure," which . . . would have to be the wages [Plaintiff] earned in 1967, his last full year of employment with [Defendant.]

As a result, Defendants argued that the Commission erred by awarding a weekly disability payment that was not based exclusively on Plaintiff's earnings during the last year that he worked at the Johns Manville facility. In our original opinion, we upheld the Commission's calculation of Plaintiff's average weekly wage in reliance on *Abernathy v. Sandoz Chems./Clariant Corp.*, 151 N.C. App. 252, 565 S.E.2d 218, *cert. denied and disc. review denied*, 356 N.C. 432, 572 S.E.2d 421 (2002), and *Moore v. Standard Mineral Co.*, 122 N.C. App. 375, 469 S.E.2d 594 (1996). In essence, we concluded in our original opinion that "*Moore* holds that the average weekly wage of a plaintiff for the purpose of determining benefits under *N.C. Gen. Stat. § 97-61.5*

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was the wage earned by the plaintiff as of the time of injury[.]” that “*Abernathy* extends the ruling of *Moore* by stating that ‘it would be obviously unfair to calculate plaintiff’s benefits based on his income upon the date of diagnosis because he was no longer employed and was not earning an income,’” so that “ ‘the only fair method for determining his average weekly wage is using his latest full year of employment,’” Pope, — N.C. at —, — S.E.2d —, 2010 N.C. App. LEXIS at *41-42 (quoting *Abernathy*, 151 N.C. App. at 259, 565 S.E.2d at 222); and that the Commission appropriately “followed the approach approved in *Abernathy* and calculated a weekly compensation rate of \$399.06 based on the wages that Plaintiff earned during his last full year of employment.” *Id.* at —, — at S.E.2d at —, 2010 N.C. App. LEXIS *42.

On rehearing, Defendants argue that (1) our previous decision with respect to the average weekly wage issue was erroneous because it relied on cases construing N.C. Gen. Stat. § 97-61.5 (2009) despite the fact that this statutory provision had no application to the present case because Plaintiff had not been removed from his employment due to asbestosis; (2) Plaintiff’s average weekly wage should be based on his earnings in 1967, which was the last year of his employment by Defendant Johns Manville; and (3) North Carolina law precludes the Commission from calculating Plaintiff’s average weekly wage by reference to the wages Plaintiff earned while working for any employer other than Defendant Johns Manville. On rehearing, we conclude that the Commission failed to make adequate findings and conclusions concerning the issues involved in determining Plaintiff’s average weekly wage and that this case should be remanded to the Commission for further proceedings not inconsistent with this opinion.

II. Legal Analysis

A. Introduction

Defendants’ rehearing petition did not challenge any portion of our initial opinion except for our decision to affirm the Commission’s calculation of the amount of Plaintiff’s average weekly wages, a figure which is used to establish Plaintiff’s weekly disability benefit payment. Accordingly, the only issue that we need to address on rehearing is the correctness of the Commission’s calculation of Plaintiff’s average weekly wage. In order to properly resolve this issue, we must review certain basic principles concerning the calculation of disability benefits under the Workers’ Compensation Act.

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The amount of disability benefits to which an injured worker is entitled under the Workers' Compensation Act is addressed in N.C. Gen. Stat. § 97-29 (2009), which provides, in pertinent part, that:

Except as hereinafter otherwise provided, where the incapacity for work resulting from the injury is total, the employer shall pay . . . to the injured employee during such total disability a weekly compensation equal to sixty-six and two-thirds percent (66 $\frac{2}{3}$ %) of his average weekly wages. . . .

The provisions of N.C. Gen. Stat. § 97-29 have been applied to the determination of disability benefits for workers diagnosed with asbestosis. *See, e.g., Bolick v. ABF Freight Sys., Inc.*, 188 N.C. App. 294, 654 S.E.2d 793 (awarding compensation for asbestosis pursuant to N.C. Gen. Stat. § 97-29), *disc. review denied*, 362 N.C. 233, 659 S.E.2d 436 (2008). The specific challenge advanced by Defendants in opposition to the Commission's calculation of disability benefits rests on the contention that the Commission erroneously determined Plaintiff's "average weekly wages" as defined in N.C. Gen. Stat. § 97-2(5).

According to N.C. Gen. Stat. § 97-2(5):

- (5) Average weekly wages.—shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury . . . divided by 52; but if the injured employee lost more than seven consecutive calendar days at one or more times during such period, although not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks remaining after the time so lost has been deducted. Where the employment prior to the injury extended over a period of fewer than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained. Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the 52 weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.

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But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

According to the Supreme Court, N.C. Gen. Stat. § 97-2(5) “sets forth in priority sequence five methods by which an injured employee’s average weekly wages are to be computed,” “establishes an order of preference for the calculation method to be used,” and provides that “the primary method, set forth in the first sentence, is to calculate the total wages of the employee for the fifty-two weeks of the year prior to the date of injury and to divide that sum by fifty-two.” *McAninch v. Buncombe County Schools*, 347 N.C. 126, 129, 489 S.E.2d 375, 377 (1997) (citing *Hensley v. Caswell Action Comm., Inc.*, 296 N.C. 527, 533, 251 S.E.2d 399, 402 (1979)). The Commission always retains the right, however, to utilize the final method of calculating an employee’s average weekly wage, which allows the use of whatever computation method would “most nearly approximate the amount which the injured employee would be earning were it not for the injury,” in extraordinary circumstances in which the use of the first four methods will produce an unfair result.

B. Disability Benefits for Asbestosis

Asbestosis is listed as a compensable occupational disease in N.C. Gen. Stat. § 97-53(24) (2009). “The general provisions of our Workmen’s Compensation Act were originally enacted for the purpose of providing compensation for industrial accidents only.” *Honeycutt v. Carolina Asbestos Co.*, 235 N.C. 471, 475, 70 S.E.2d 426, 429 (1952). “When it became apparent that the Act should include a provision for payment of compensation to employees disabled by diseases or abnormal conditions of human beings *the causative origin of which was occupational in nature*, the legislature adopted in 1935 what is now codified as [N.C. Gen. Stat. §] 97-52 [*et seq.*].” *Morrison v. Burlington Indus.*, 304 N.C. 1, 12, 282 S.E.2d 458, 466 (1981).

The provisions with respect to occupational diseases were enacted later. And while occupational diseases, as well as ordinary industrial accidents, are now recognized as a proper expense of industry, the manner in which disability is brought about by an occupational disease is so inherently different from an ordinary accident, it is sometimes difficult to administer the law with respect to such disease under machinery adopted for the purpose

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of administering claims growing out of ordinary accidents. In such circumstances it becomes the duty of the courts to give effect to obvious legislative intent.

Honeycutt, 235 N.C. at 475-76, 70 S.E.2d at 429 (citation omitted).

The Supreme Court also observed that:

An employee does not contract or develop asbestosis or silicosis in a few weeks or months. These diseases develop as the result of exposure for many years to asbestos dust or dust of silica. Both diseases, according to the textbook writers, are incurable and usually result in total permanent disability.

Id. at 476-77, 70 S.E.2d at 430. “The slow development, incurable nature, and usual permanence of the disability resulting from asbestosis and silicosis were pointed to in [*Honeycutt*] as reasons prompting the Legislature to draw distinctions between the tests for compensation to be paid to an injured employee and a diseased employee suffering from silicosis.” *Pitman v. L.M. Carpenter & Assocs.*, 247 N.C. 63, 67, 100 S.E.2d 231, 234 (1957).

As the cases discussed in the preceding paragraph suggest, workers’ compensation claims arising from occupational diseases may present distinct factual issues that arise from the long latency period between initial exposure and subsequent diagnosis with a disease. For example, a plaintiff may, as in this case, be diagnosed with asbestosis years after leaving the employment in which his or her exposure to asbestos occurred or after he or she has retired from all employment. In view of the difference between occupational disease claims and claims arising from work-related accidents, the General Assembly has enacted a number of specific statutory provisions applicable to asbestos-related workers’ compensation claims.

N.C. Gen. Stat. § 97-55 (2009) defines “disability” as “the state of being incapacitated as the term is used in defining ‘disablement’ in [N.C. Gen. Stat. §] 97-54.” (Emphasis added). N.C. Gen. Stat. § 97-54 (2009), in turn, states that:

The term “disablement” as used in this Article as applied to cases of asbestosis and silicosis means the event of becoming actually incapacitated because of asbestosis or silicosis to earn, in the same or any other employment, the wages which the employee was receiving at the time of his last injurious exposure to asbestosis or silicosis; but in all other cases of occupational

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disease “disablement” shall be equivalent to “disability” as defined in [N.C. Gen. Stat. § 97-2(9)].

Thus, “unlike the case of disablement from other occupational diseases, disablement from silicosis and asbestosis is measured from the time a claimant can no longer work at dusty trades, not from the time he can no longer work at any job.” *Taylor v. J. P. Stevens & Co.*, 300 N.C. 94, 100, 265 S.E.2d 144, 147 (1980). For that reason:

[i]n order to support a conclusion that a claimant is totally and permanently disabled by exposure to asbestos, and entitled to benefits under N.C. Gen. Stat. § 97-29 (2005) the Commission must find that the claimant is totally unable, . . . “as a result of the injury arising out of and in the course of his employment,” . . . “to earn, in the same or any other employment, the wages which the employee was receiving at the time of his last injurious exposure to asbestosis or silicosis,” N.C. Gen. Stat. § 97-54 (2005).

Estate of Gainey v. Southern Flooring & Acoustical Co., 184 N.C. App. 497, 503, 646 S.E.2d 604, 608 (2007) (quoting *Frazier v. McDonald’s*, 149 N.C. App. 745, 752, 562 S.E.2d 295, 300 (2002), *cert. denied*, 356 N.C. 670, 577 S.E.2d 117 (2003)).

Although the General Assembly enacted a specific definition of “disability” for use in evaluating asbestosis claims, N.C. Gen. Stat. § 97-64 (2009) explicitly provides that the calculation of the amount of disability compensation awarded in cases involving asbestosis should be the same as the amount awarded for all other causes of disability:

General provisions of act to control as regards benefits

Except as herein otherwise provided,¹ in case of disablement or death from silicosis and/or asbestosis, compensation shall be payable in accordance with the provisions of the North Carolina Workers’ Compensation Act.

N.C. Gen. Stat. § 97-64 (emphasis added). Thus, “the general rule [is] that an employee becoming disabled by asbestosis or silicosis within

1. “The exceptions to which N.C. [Gen. Stat.] § 97-64 refers are found in N.C. [Gen. Stat.] §§ 97-61.1 through -61.7[, which] establish a series of examinations . . . of ‘an employee [who] has asbestosis or silicosis[.]’ . . . ‘If the Industrial Commission finds . . . that the employee has either asbestosis or silicosis . . . it shall by order remove the employee from any occupation which exposes him to the hazards of asbestosis or silicosis . . . [and] shall pay or cause to be paid . . . to the employee affected by such asbestosis

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the terms of the specific definition embodied in [N.C. Gen. Stat. §] 97-54, should be entitled to ordinary compensation measured by the general provisions of the Workmen's Compensation Act." *Young v. Whitehall Co.*, 229 N.C. 360, 366, 49 S.E.2d 797, 801 (1948). As a result, given his asbestos-related disability, Plaintiff is entitled to compensation determined in accordance with N.C. Gen. Stat. § 97-29 and § 97-2(5).

In our original opinion, we noted that, for purposes of determining disability benefits for asbestosis, the "time of the injury" is deemed to be the date that a claimant is diagnosed with the disease. "This Court, in *Moore v. Standard Mineral Company*, 122 N.C. App. 375, 469 S.E.2d 594 (1996), held that the proper date for determining the average weekly wage of a plaintiff . . . was as of the time of injury, which was deemed to be the date of diagnosis of silicosis or asbestosis."² *Abernathy*, 151 N.C. App. at 257, 565 S.E.2d at 221. See also *Wilder v. Amatex Corp.*, 314 N.C. 550, 560, 336 S.E.2d 66, 72 (1985), holding that, for purposes of determining the date upon which the statute of limitations for an occupational disease claim begins to run, the date of injury was the date of diagnosis:

[T]he legislature and the Court have recognized that exposure to disease-causing agents is not itself an injury. . . . Although persons may have latent diseases of which they are unaware, it is not possible to say precisely when the disease first occurred in the body. The only possible point in time from which to measure the "first injury" in the context of a disease claim is when the disease is diagnosed.

In their original appeal, Defendants argued that, since Plaintiff was no longer working at the time that he was diagnosed with asbestosis, he was not entitled to disability benefits, an argument that is premised on equating the date of "injury" with the date of diagnosis. Similarly, on rehearing, Defendants do not dispute that the date of

or silicosis a weekly compensation equal to sixty-six and two-thirds percent (66 2/3%) of his average weekly wages before removal from the industry . . . which compensation shall continue for a period of 104 weeks.'" *Clark v. ITT Grinnell Indus. Piping, Inc.*, 141 N.C. App. 417, 429, 539 S.E.2d 369, 376 (2000) (quoting N.C. Gen. Stat. § 97-61.1; N.C. Gen. Stat. § 97-61.5(b) (1991), remanded for reconsideration in light of *Austin v. Continental General Tire*, 354 N.C. 344, 553 S.E.2d 680 (2001). As Plaintiff was not "removed" from his employment, these statutory provisions have no application to the present situation.

2. The Plaintiff in *Moore* sought disability compensation under N.C. Gen. Stat. § 97-61.5, while Plaintiff in this case is entitled to compensation pursuant to N.C. Gen. Stat. § 97-64. However, our holding to the effect that the date of diagnosis was the date of injury did not hinge upon the identity of the statute under which the plaintiff claimed the right to compensation.

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Plaintiff's "injury" is the same as the date of diagnosis. As Defendants have observed, Plaintiff was earning no wages at that time. For that reason, in the event that the Commission were to utilize any of the first four methods of determining average weekly wages enunciated in N.C. Gen. Stat. § 97-2(5), Plaintiff would not be entitled to any disability benefits at all. However, as we have already noted, N.C. Gen. Stat. § 97-2(5) also provides that:

[W]here for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

According to the Supreme Court, however:

The final method, as set forth in the last sentence, clearly may not be used unless there has been a finding that unjust results would occur by using the previously enumerated methods. Ultimately, the primary intent of this statute is that results are reached which are fair and just to both parties. . . . "Ordinarily, whether such results will be obtained . . . is a question of fact; and in such case a finding of fact by the Commission controls decision."

McAninch, 347 N.C. at 130, 489 S.E.2d at 378 (citing *Wallace v. Music Shop, II, Inc.*, 11 N.C. App. 328, 181 S.E.2d 237 (1971), and quoting *Liles v. Faulkner Neon & Elec. Co.*, 244 N.C. 653, 660, 94 S.E.2d 790, 795-96 (1956)). As a result, in the event that the Commission elects to employ an alternative method for calculating a claimant's average weekly wage and fails to make findings of fact addressing the issue of whether "unjust results would occur by using the previously-enumerated methods," *Id.*, its order is affected with legal error, and the case must be remanded for further proceedings. *See, e.g., Boney v. Winn Dixie, Inc.*, 163 N.C. App. 330, 333, 593 S.E.2d 93, 96 (2004) (remanding for additional findings where the "Commission did not clearly state what method it used to calculate decedent's average weekly wage").

C. Analysis of the Commission's Decision

As we have already noted, application of the first four methods for computing average weekly wages set out in § 97-2(5) would preclude Plaintiff from receiving any disability benefits. The Commission, however, found in its order that "Plaintiff earned \$31,127.00 the last year he worked . . . [which] is sufficient for a compensation rate of \$399.06[.]" and ordered that "Defendants shall pay

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total disability benefits in the amount of \$399.06 per week[.]” Thus, it is clear that the Commission calculated Plaintiff’s average weekly wage by reference to his earnings during his last year of employment. The only way in which the Commission could have reached this result is through reliance on the final computation method set forth in N.C. Gen. Stat. § 97-2(5). The Commission did not, however, offer any justification for the adoption of this approach in its Opinion and Award.

We cannot conclude that, under all circumstances and regardless of the Commission’s findings of fact, an approach to calculating average weekly wages utilizing the fifth method of computation specified in N.C. Gen. Stat. § 97-2(5) that does not rely upon the amount that Plaintiff earned while working for the employer in whose employment he or she was exposed to asbestos would never be permissible. On the contrary, the literal language of the fifth approach authorized by N.C. Gen. Stat. § 97-2(5) would appear to allow the use of any method of computing average weekly wages that would “most nearly approximate the amount which the injured employee would be earning were it not for the injury.”

In *Abernathy*, a case with certain factual similarities to this case, this Court upheld an approach to calculating average weekly wages that bears some resemblance to that adopted by the Commission in this case. In *Abernathy*, the plaintiff was diagnosed with asbestosis following his retirement. This Court noted that, under N.C. Gen. Stat. § 97-2(5), the Commission could employ a non-standard method of calculating wages in the event that it found that the use of any other method specified in N.C. Gen. Stat. § 97-2(5) would produce an unjust result. In addition, we stated that:

In the present case, it would be obviously unfair to calculate plaintiff’s benefits based on his income upon the date of diagnosis because he was no longer employed and was not earning an income. And, since the General Assembly has made no specific provision for determining compensation pursuant to [N.C. Gen. Stat.] § 97-64 when a former employee is diagnosed with asbestosis some time after his removal from the employment, the only statutory provision which may in fairness be used is the method recited above.

Abernathy, 151 N.C. App. at 258, 565 S.E.2d at 222. However, the Commission’s Opinion and Award in this case does not contain findings indicating that it considered using the other methods for computing the average weekly wage and stating the reason that it

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declined to use them in determining the amount of weekly disability benefits which Plaintiff was entitled to receive. In addition, the Commission's Opinion and Award lacks the required finding that use of the first four methods of calculating average weekly wages set out in N.C. Gen. Stat. § 97-2(5) "would be unfair, either to the employer or employee." Assuming that the Commission was attempting to utilize the fifth method for calculating average weekly wages set out in N.C. Gen. Stat. § 97-2(5) in order to determine the amount of compensation to which Plaintiff was entitled, its failure to make the findings and conclusions required as a precondition for use of that computational method constituted an error of law. As a result, given the Commission's failure to make the necessary factual findings and legal conclusions, we are compelled to "remand this case to the Commission for recalculation of [Plaintiff's] average weekly wage and appropriate findings of fact to support that recalculation." *Boney*, 163 N.C. App. at 334-35, 593 S.E.2d at 97. On remand, the parties are free to advocate the use of whatever method of computing average weekly wages they deem appropriate, and the Commission must make adequate findings and conclusions supporting the method of calculation it ultimately deems appropriate.

D. Other Issues

In their rehearing petition and supplemental brief, Defendants have advanced a number of arguments that are inconsistent with the result we have reached on rehearing. In the course of deciding this case, we have carefully considered each of Defendants' arguments. However, except to the extent that we have explicitly adopted Defendants' arguments elsewhere in this opinion, we find them to be unpersuasive.

First, Defendants argue that this Court erroneously calculated Plaintiff's average weekly wage in its original opinion by relying on the provisions of N.C. Gen. Stat. § 97-61.5. We agree with Defendants that Plaintiff's claim for workers' compensation benefits is not governed by N.C. Gen. Stat. § 97-61.5, since Plaintiff was not removed from the employment in which he was subject to exposure to asbestos. However, we did not rely on N.C. Gen. Stat. § 97-61.5 for the purpose of ascertaining the amount of weekly disability benefits to which Plaintiff was entitled in our original opinion and we have not relied on N.C. Gen. Stat. § 97-61.5 for that purpose on rehearing.

In addition, Defendants argue that N.C. Gen. Stat. § 97-54 "mandates" that disability benefits for asbestosis be limited to the amount

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earned by the claimant at the time of his “last injurious exposure,” even if that exposure occurred decades before Plaintiff’s diagnosis. More specifically, Defendants contend that N.C. Gen. Stat. § 97-54 “eliminates the potential need . . . for analysis under N.C. Gen. Stat. § 97-2(5);” that, under N.C. Gen. Stat. § 97-54, “the employer in whose employment the employee was ‘last injuriously exposed’ pays the claim at the wages applicable at that time;” and that, if N.C. Gen. Stat. § 97-54 and N.C. Gen. Stat. § 97-64 are considered in *pari materia*, one must inevitably conclude that N.C. Gen. Stat. § 97-54, which defines disablement, also controls the amount of disability compensation to which the claimant is entitled.

Defendants have not, however, cited any authority that utilizes the phrase “wages which the employee was receiving at the time of his last injurious exposure to asbestosis” as it appears in the definition of disability set out in N.C. Gen. Stat. § 97-54 for the purpose of establishing the amount of disability benefits to which a claimant suffering from asbestosis is entitled. The absence of any indication in the relevant statutory language that the language that Defendants have taken from N.C. Gen. Stat. § 97-54 plays any role in calculating the level of disability benefits that should be awarded to a claimant who has been diagnosed as suffering from asbestosis militates strongly against the validity of Defendants’ argument. Moreover, the General Assembly has demonstrated the ability to enact provisions that are specifically applicable to asbestosis and silicosis claims. Had the General Assembly wished to require the use of a specific method for calculating disability benefits for claimants suffering from asbestosis, it could and would have done so. Instead, the plain language of N.C. Gen. Stat. § 97-64, which states that, “in case of disablement or death from silicosis and/or asbestosis, compensation shall be payable in accordance with the provisions of the North Carolina Workers’ Compensation Act,” explicitly rejects the use of a separate and distinct method for calculating disability benefits in asbestosis cases. Thus, we conclude that N.C. Gen. Stat. § 97-54 does not control the calculation of the disability benefits that should be paid to a claimant suffering from asbestosis and that the statutory reference to the “wages which the employee was receiving at the time of his last injurious exposure to asbestosis” in N.C. Gen. Stat. § 97-54 is merely part of the definition of “disablement.”

Furthermore, Defendants argue that the Commission was barred by applicable precedent from basing the calculation of Plaintiff’s average weekly wage on the wages paid by any employer other than

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the one in whose employment he was last injuriously exposed to asbestos. In support of this position, Defendants cite cases such as *McAninch*, and *Barnhardt v. Yellow Cab Co.*, 266 N.C. 419, 146 S.E.2d 479 (1966). In both of these cases, the claimant had multiple employers during the 12 month period utilized to determine his or her average weekly wage. In such circumstances, the Supreme Court has clearly held that the Commission cannot, even if it relies on the fifth method for determining a claimant's average weekly wage set out in N.C. Gen. Stat. § 97-2(5), make the necessary calculation by aggregating or combining his wages from more than one job. Aside from prohibiting the Commission from utilizing wages from multiple jobs to calculate a claimant's average weekly wage, neither *McAninch* nor *Barnhardt* limits the evidence upon which the Commission is entitled to rely in attempting to "approximate the amount which the injured employee would be earning were it not for the injury" during its application of the fifth method for calculating average weekly wages set out in N.C. Gen. Stat. § 97-2(5).

In addition, Defendants cite *Barnhardt* in support of their contention that "it would be unfair to require an employer to pay workers' compensation benefits in excess of the payroll insured by the insurance carrier." Defendants argue that requiring them to pay disability calculated on the basis of Plaintiff's earnings in 2003 is "a situation which could not have been predicted or bargained for at the time Carrier-Defendant entered into a contract of insurance with Employer-Defendant." In essence, Defendants argue that requiring them to pay disability based on 2003 earnings is an unfair impairment of their right to contract, an argument that the Supreme Court of North Carolina rejected in *Wood v. J. P. Stevens & Co.*, 297 N.C. 636, 256 S.E.2d 692 (1979).

In *Wood*, the defendants "denied liability on the ground that the . . . occupational disease was not covered by the Workmen's Compensation Act as it existed at the time the disease was contracted." *Id.* at 638, 256 S.E.2d at 694. The Commission ruled that the plaintiff's claim was governed by the workers' compensation law when she left her employment in 1958, which was several decades before the date upon which she sought workers' compensation benefits. On appeal, the Supreme Court noted that disablement from an occupational disease triggered the right to compensation and concluded that "it follows that the employee's right to compensation in cases of occupational disease should be governed by the law in effect

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at the time of disablement.” *Id.* at 644, 256 S.E.2d at 698. In reaching this conclusion, the Court noted that

Courts in a few jurisdictions have refused to apply the law in effect at the time of disability in cases where the statute granting recovery was enacted after the claimant terminated his employment. This result has been justified on the grounds that to hold otherwise would be to allow an impairment of contract.

Id. at 648, 256 S.E.2d at 700 (citations omitted). However, the Supreme Court rejected this argument, stating that:

Although superficially appealing, this interpretation does not withstand close analysis. The Workmen’s Compensation Act is often spoken of as being part of the employment contract. However, the relationship between a covered employer and employee is clearly not contractual in the usual sense of that term.

...

The liability of the employer under our Workmen’s Compensation Act arises not from the individual employment contract but from the Act itself.

...

“The net result . . . is that the workmen’s compensation ‘contract’ includes everything that the Legislature and the courts say it shall include, whether added before or after the injury.” . . .

. . . “In a certain limited sense, the rights and liabilities arise out of contract, on the theory that the statute becomes a part of the contract of employment . . . but, strictly speaking, such rights and liabilities are created independently of any actual or implied contract and, pursuant to the police power, are imposed upon the employment status or relationship as a cost of industrial production.”

Id. at 648-50, 256 S.E.2d at 700-01 (quoting *McAllister v. Board of Education*, 79 N.J. Super. 249, 259-60, 191 A. 2d 212, 217-18 (1963), *aff’d*, 42 N.J. 56, 198 A. 2d 765 (1964), and *Todeva v. Oliver Iron Mining Co.*, 232 Minn. 422, 428, 45 N.W. 2d 782, 787-88 (1951)).

We conclude that the reasoning set out in *Wood* is equally applicable to the issue of the calculation of an asbestosis claimant’s disability benefits. As is discussed in more detail above: (1) N.C. Gen. Stat. § 97-64 directs that disability benefits be calculated for claimants suffering from asbestosis under the same rules as those

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applicable to other claimants and (2) N.C. Gen. Stat. § 97-2(5) defines the manner in which average weekly wages are to be calculated. Given the long latency period for asbestosis, it is inevitable that claimants may leave the employment in which they are exposed to asbestos years, even decades, before they are diagnosed. As discussed in *Abernathy*, this situation may justify the use of an alternative approach for calculating the claimant's average weekly wage. Since North Carolina law plainly allows the use of alternative computation methods in certain circumstances and in the event that proper procedures are followed in order to "approximate the amount which the injured employee would be earning were it not for the injury," N.C. Gen. Stat. § 97-2(5), and since the provisions of N.C. Gen. Stat. § 97-2(5) as they existed at the time of Plaintiff's "disablement" apply to Plaintiff's claim in accordance with the logic of *Wood*, we do not find Defendants' insurance rate-based claim persuasive.³

Finally, we note that, in an *amicus curiae* brief, the North Carolina Association of Defense Attorneys argues that (1) the Commission erred by calculating Plaintiff's disability benefits based on his employment following his last injurious exposure to asbestos and that (2) the Commission erred by failing to apportion Plaintiff's disability award among his asbestosis and "other disabling non-work-related conditions." For reasons we have already discussed, we do not find the first argument advanced in the *amicus curiae* brief persuasive. Moreover, the second issue was not advanced in Defendants' petition for rehearing or in Defendants' original brief on appeal and is not, for that reason, properly before us. *See* N.C.R. App. P. 31(d) (stating that on rehearing "briefs shall be addressed solely to the points specified in the order granting the petition to rehear"). Thus, except to the extent set forth above, we are not persuaded by Defendant's challenges to the Commission's order.⁴

3. As an aside, we note that the economic arguments based on the amount of insurance premiums paid by Defendant Johns Manville to Defendant St. Paul can cut both ways, given the time value of money as applied to the insurance payments made from Defendant Johns Manville to Defendant St. Paul.

4. Similarly, we are not persuaded by Plaintiff's argument that Defendants failed to preserve their challenge to the Commission's decision concerning the calculation of average weekly wages for appellate review. As we read the record, Defendants challenged the lawfulness of the method ultimately utilized for the purpose of calculating Plaintiff's average weekly wages on appeal from the Deputy Commissioner's Opinion and Award, which is all that we believe Defendants were obligated to do. Thus, we decline Plaintiff's request that we refuse to consider Defendants' arguments on the merits.

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III. Conclusion

As a result, for the reasons discussed above, we adopt our original opinion except for that portion which affirmed the Commission's calculation of Plaintiff's average weekly wage. With respect to that issue, we conclude that the Commission erred by failing to adopt one of the first four methods for calculating claimant's average weekly wage set out in N.C. Gen. Stat. § 97-2(5) without making sufficient findings and conclusions to allow use of the fifth method for calculating a claimant's average weekly wage set out in that statutory provision. As a result, we remand this case to the Commission for reconsideration of the amount of weekly disability benefits to which Plaintiff is entitled, with instructions that the Commission should reconsider the method of calculating the average weekly wage to be utilized in determining Plaintiff's weekly disability benefit payment and make any findings and conclusions that are necessary for the implementation of the calculation method that it ultimately deems appropriate.

AFFIRMED IN PART, REMANDED IN PART.

Judges GEER and STROUD concur.

STATE OF NORTH CAROLINA DURHAM COUNTY IN THE MATTER OF THE WILL
OF LEYLA K. BAITSCHORA, DECEASED

STATE OF NORTH CAROLINA DURHAM COUNTY MARTIN TOTORGUL, PLAINTIFF V.
ISMAIL ABAYHAN, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF LEYLA K.
BAITSCHORA, ZUBAYDA RENATE ABAYHAN, URSULA S. ABAYHAN, CHASE
INVESTMENT SERVICES CORP., AND GENWORTH LIFE AND ANNUITY INSUR-
ANCE COMPANY, DEFENDANTS

No. COA09-1141

(Filed 21 September 2010)

1. Evidence— Dead Man's Statute—exclusion of oral statements harmless error

A *de novo* review revealed that although the trial court erred in a caveat proceeding by excluding oral communications between propounder and decedent based on its failure to find that a waiver had occurred under N.C.G.S. § 8C-1, Rule 601(c), the Dead Man's Statute, the evidence was tangential, at best, on

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the issue of undue influence. Further, the jury heard the same or similar evidence during the course of the trial.

2. Wills— caveat proceeding—instruction—fiduciary relationship

The trial court did not err in a caveat proceeding in its jury instruction regarding a fiduciary relationship. The trial court instructed the jury on the legal consequences of a principal-agent relationship, if one existed, and then treated the issue as a factual matter for jury resolution. The instruction properly placed the burden of proof on caveator.

Appeal by propounder from judgment entered 21 November 2008 and order entered 9 December 2008 by Judge James E. Hardin in Durham County Superior Court. Heard in the Court of Appeals 24 February 2010.

McPherson, Rocamora & Nicholson, P.L.L.C., by William V. McPherson, Jr., for propounder-appellant.

Glenn, Mills, Fisher & Mahoney, P.A., by Carlos E. Mahoney, for caveator-appellee.

HUNTER, JR., Robert N., Judge.

This appeal concerns a caveat proceeding regarding the purported will of Leyla K. Baitschora (“decedent”). Ismail Abayhan (“propounder”),¹ decedent’s nephew, appeals a judgment and order from the trial court. The judgment set aside decedent’s purported will after a jury determined that it was procured by undue influence. The order taxed decedent’s estate with Martin Totorgul’s (“caveator’s”) attorneys’ fees and costs.

Propounder argues on appeal that the trial court erred by: (1) excluding oral communications between decedent and propounder; (2) charging the jury that a fiduciary relationship existed between propounder and decedent; and (3) awarding caveator attorneys’ fees and costs after notice of appeal was entered from the judgment. After review, we find no prejudicial error.

I. BACKGROUND

At trial, the evidence tended to show the following. In early May 2007, decedent was seventy-six years old and living in a New York

1. “Propounder’s sisters, Ursula and Zubayda Renate Abayhan, were also propounders at trial, but are not parties to this appeal. Accordingly, we will refer to propounder herein in the singular.

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apartment with her son, caveator. Caveator had been taking care of decedent for over a year, during which time decedent underwent her second round of chemotherapy treatment for terminal uterine cancer. During the treatment, she had large amounts of fluid regularly drained from her abdomen.

Ms. Gregory, a neighbor, testified that decedent and caveator had a close relationship prior to May 2007. Decedent told Ms. Gregory that she wanted to leave all of her assets to caveator and had signed a paper writing to that effect in front of Ms. Gregory. At the time this first writing was executed, caveator was the beneficiary of decedent's brokerage accounts and an annuity. Caveator also served as decedent's health care agent.

On the evening of 13 May 2007, a dispute arose between decedent and caveator. Caveator testified that the dispute concerned the refusal of his mother to eat some food that he had prepared. Propounder attempted to offer rebuttal testimony that the dispute escalated and frightened decedent when caveator cursed at decedent, broke some dishes, and kicked furniture; however, this proffered testimony was excluded by the trial court.

After this argument occurred and while the caveator was shopping later that same evening, decedent went to a neighbor's apartment and asked if she could spend the night. The next morning, decedent demanded that caveator leave and return the keys to her apartment, which he did. After caveator left, decedent went to Chase Bank, met with her financial advisor, Jorge Torres, and executed new beneficiary designations for two brokerage accounts. Decedent changed the beneficiary designations from caveator alone to propounder and his two sisters, Ursula and Zubayda Renate Abayhan, in equal shares. To obtain contact and identifying information for this change, Mr. Torres called Ursula Abayhan. Ursula subsequently called propounder and told him that decedent was changing the beneficiaries on her accounts. Decedent also changed the beneficiary designations on an annuity she had with Genworth Life to allow propounder, Ursula, and Zubayda to be the beneficiaries in equal shares.²

A short time after changing these beneficiary designations, decedent was taken to Cabrini Medical Center and hospitalized until 17 May 2007. The next day, propounder, at decedent's request, arrived at decedent's apartment. Propounder was surprised by decedent's poor

2. The net value of the two Chase brokerage accounts and the Genworth Life annuity was \$307,424.51.

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health, and proceeded to stay in decedent's apartment from 18 to 22 May 2007. On 23 May 2007, propounder packed decedent's possessions and moved her from New York to his home in Durham, North Carolina.

On 24 May 2007, one day after bringing decedent to Durham, propounder called Mr. Torres about transferring decedent's accounts from Chase Bank to Wachovia Bank in Durham. Mr. Torres later testified in his deposition that propounder "said he had a relationship with a financial advisor at Wachovia and he was looking to transfer the investment account to that person." Later the same day, propounder took decedent to Roseanne Wallace, propounder's personal banker at Wachovia. Ms. Wallace described decedent at the meeting as being "frail and weak." While at the bank, decedent opened two Wachovia accounts so that she could transfer her money from New York. Ms. Wallace suggested at the meeting that decedent have a will executed in North Carolina. Sometime during this same day, propounder prepared a withdrawal request form for the annuity at Genworth Life and attempted to collect money owed to decedent by one of decedent's friends.

On 25 May 2007, propounder brought decedent back to Wachovia, and decedent opened an individual retirement account ("IRA"). Decedent funded the Wachovia IRA with cash from an IRA she had at Fidelity Bank. Propounder and his two sisters were named the beneficiaries, in equal shares, of the newly established Wachovia IRA. At the meeting with Ms. Wallace, propounder claimed to have decedent's power of attorney, though no document had been executed by decedent.

On 31 May 2007, decedent was admitted to Duke Medical Center after suffering shortness of breath, prolonged constipation, dehydration, abdominal pain, and lack of appetite. Decedent stayed in the hospital until 7 June 2007.

On 4 June 2007, propounder asked Ms. Wallace to find an attorney to draft a will. Ms. Wallace later testified that "they needed to go ahead and get the will completed." One of Ms. Wallace's colleagues at Wachovia contacted Attorney Gwendolyn Brooks' office and said that they were "sending a client . . . who needs a will for his aunt ASAP." Propounder called Attorney Brooks the same day and spoke to her paralegal, Mary Jane Weithe. Propounder told Ms. Weithe that he would be the sole beneficiary and executor. On 6 June 2007, propounder talked to Ms. Weithe about being named decedent's attorney-in-fact under a power of attorney and reiterated that he would be the sole recipient of all of decedent's personal property under the will.

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On 7 June 2007, decedent was released from the hospital, and propounder called Ms. Weithe to schedule a meeting to discuss decedent's will. Decedent was readmitted to the hospital emergency room on 11 June 2007. During the admission process, propounder called Attorney Brooks' office and Ms. Wallace several times. At 9:00 a.m., propounder reached Ms. Weithe and arranged for her to meet with decedent. He also arranged for decedent to sign a power of attorney in his favor. At 11:00 a.m., decedent met with Ms. Weithe and discussed the terms of the will in propounder's presence. During the conversation, propounder interjected information several times. Ms. Weithe reviewed the power of attorney form with decedent, and decedent signed the document making propounder her attorney-in-fact. Decedent told Ms. Weithe to prepare the will promptly. The next day, 12 June 2007, decedent executed another power of attorney because her name was misspelled in the prior draft and because Zubayda was named as a co-successor.

Following the meeting on 11 June 2007 between decedent and Ms. Weithe, propounder called Ms. Weithe and Ms. Wallace several times about the will. Attorney Brooks prepared the will. On 12 June 2007, propounder called Ms. Weithe twice to find out when the will would be executed. Propounder was present when the will was signed. Attorney Brooks did not personally meet with decedent; as a result, she received most of her information concerning decedent's health, mental capacity, and testamentary intent from Ms. Weithe. No attorney was present at the will's execution.

A "Do Not Resuscitate Order" was issued for decedent several hours after the will was signed. On the morning of 13 June 2007, decedent was discharged from the hospital in order to go home and die. After her discharge, propounder immediately began transferring money. On 14 June 2007, decedent's Wachovia IRA became fully funded. The following day, propounder transferred the Wachovia IRA funds to decedent's Wachovia checking account—an account which he solely would inherit under the will. Between 11 and 18 June 2007, propounder moved approximately \$180,000 into decedent's checking account. On 21 June 2007, propounder transferred \$44,000 from decedent's checking account to her money market account. On 22 June 2007, decedent died in propounder's home.

Propounder attempted to probate the will on 25 June 2007, but when Ms. Weithe informed propounder that the firm could not handle the matter until August 2007, propounder sought other counsel. On 28 June 2007, propounder proffered the will for probate in common form

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as the Last Will and Testament of decedent. The effect of the will was to leave \$243,260.34 of probate assets solely to propounder. Decedent's non-probate assets, the Chase Bank and Genworth Life accounts, were to be divided into three equal shares between propounder, Ursula, and Zubayda. The will provided that the tangible personal assets, cash, and intangible assets held in the decedent's savings or checking accounts were to be distributed to propounder and the residuary estate to be divided in equal shares among propounder and his sisters. Due to propounder's actions between 13 and 22 June 2007, all probate assets of the estate at the time of decedent's death consisted of tangible personal assets, cash, and intangible assets held in decedent's savings or checking accounts, thereby leaving propounder's sisters with nothing under the will.

On 22 August 2007, caveator filed a caveat proceeding to contest the probate of the will on the grounds that decedent lacked sufficient mental capacity in that she could not: "(a) understand that she was making a will, (b) know what property she possessed, (c) understand the effect that the act of making a will would have on her property, (d) understand who would naturally be expected to receive her property upon her death, and/or (e) know to whom she intended to give her property." Caveator additionally alleged that the will was procured by undue influence.

Simultaneously with the filing of the caveat, caveator also filed a civil action challenging the decedent's ability to execute the beneficiary designations which disposed of the non-probate estate. This action was consolidated with the caveat proceeding; however, Caveator has not challenged the outcome of the corollary action on appeal.

The caveat proceeding was called for trial on 10 November 2008, and lasted for eight days. On 20 November 2008, the jury returned its verdict, and found that the will had been procured by undue influence. The jury also found that decedent had sufficient mental capacity to execute the will and the beneficiary designations for the non-probate accounts with Chase Bank and Genworth Life. As a result, propounder and his two sisters remained the beneficiaries in equal shares of the non-probate assets. On 21 November 2008, the trial court entered judgment setting aside the will and declaring that decedent died intestate. Propounder filed notice of appeal from the judgment on 8 December 2008.

Caveator filed a motion for attorneys' fees and costs pursuant to N.C. Gen. Stat. § 6-21(2) (2009) in the amount of \$68,678.09 on 21 November 2008. On 24 November 2008, caveator filed a motion to

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have funds returned to the estate from propounder, including \$40,000 in costs and attorneys' fees expended by propounder without a court order. On 9 December 2008, propounder filed his own motion for attorneys' fees and costs to be taxed to the estate in the amount of \$144,809.71. After a hearing, the trial court granted caveator's motion for attorneys' fees and costs, and deferred its decision on propounder's motion pending the outcome of this appeal. Propounder filed a second notice of appeal from the trial court's order as to fees and costs on 16 December 2008.

On appeal, propounder presents three issues: (1) whether the trial court erred in excluding from evidence certain oral communications between propounder and decedent, (2) whether the trial court erred in instructing the jury that a fiduciary relationship existed between propounder and decedent, and (3) whether the trial court had jurisdiction to enter the order awarding caveator's attorneys' fees and costs after notice of appeal was taken from the judgment.

II. JURISDICTION AND STANDARD OF REVIEW

The judgment entered herein is a final judgment from which appeal lies to this court pursuant to N.C. Gen. Stat. § 7A-27(b) (2009).

A. There is confusion in the law as to the standard of review of a decision regarding N.C. Gen. Stat. § 8C-1, Rule 601(c) (2009). Rule 601 generally governs the competency of witnesses, and determinations based thereupon are reviewed for abuse of discretion. *See State v. Liner*, 98 N.C. App. 600, 606, 391 S.E.2d 820, 823 (1990). However, the function of Rule 601(c) is to exclude proffered testimony when it is shown “ ‘(1) that such witness is a party, or interested in the event, (2) that his testimony relates to a personal transaction or communication with the deceased person, (3) that the action is against the personal representative of the deceased or a person deriving title or interest from, through or under the deceased, and (4) that the witness is testifying in his own behalf or interest[,]’ ” *In re Will of Lamparter*, 348 N.C. 45, 51, 497 S.E.2d 692, 695 (1998) (quoting *Godwin v. Wachovia Bank & Trust Co.*, 259 N.C. 520, 528, 131 S.E.2d 456, 462 (1963), and when none of the circumstances which result in a waiver of the prohibition set out in Rule 601(c) exist. In order to make this determination, the trial court, in the first instance, and this Court, on appellate review, are required to determine the manner in which a number of legal principles should be applied. Unlike the situation with respect to N.C. Gen. Stat. § 8C-1, Rule 403 (2009) or with respect to Rule 601(a) or (b), nothing in the language of Rule 601(c) suggests that the implementation of the Dead

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Man's Statute involves the making of a discretionary determination, although the fact that its application may, under some circumstances, involve what amounts to a relevance determination does suggest that a degree of deference should be given to the trial court's decision. In similar circumstances, our Court has declined to utilize an abuse of discretion standard of review. *State v. Wallace*, 104 N.C. App. 498, 410 S.E.2d 226 (1991) (stating that Rule 401 "sets a standard to which trial judges must adhere in determining whether proffered evidence is relevant," although "this standard gives the judge great freedom to admit evidence because the rule makes evidence relevant if it has any logical tendency to prove any fact that is of consequence"; for that reason, "even though a trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to [N.C. Gen. Stat. § 8C-1,] Rule 403, such rulings are given great deference on appeal"). *Id.* at 502, 410 S.E.2d at 228. As a result, the standard of review for use in this case is one that involves a *de novo* examination of the trial court's ruling, with considerable deference to be given to the decision made by the trial court in light of the relevance-based inquiries that are inherent in the resolution of certain issues involving application of Rule 601(c), including the provisions which result in "opening the door" to the admission of otherwise prohibited testimony.

B. In reviewing jury instructions, this Court must review and consider jury instructions "in their entirety." *Arndt v. First Union Nat'l Bank*, 170 N.C. App. 518, 525, 613 S.E.2d 274, 279 (2005). The "appealing party must show not only that error occurred in the jury instructions but also that such error was likely, in light of the entire charge, to mislead the jury." *Estate of Hendrickson v. Genesis Health Venture, Inc.*, 151 N.C. App. 139, 151, 565 S.E.2d 254, 262 (2002). The trial court is "required to instruct a jury on the law arising from the evidence presented." *Arndt*, 170 N.C. App. at 525, 613 S.E.2d at 279 (citation omitted); see N.C. Gen. Stat. § 1A-1, Rule 51 (2009).

C. With regard to the jurisdiction of the trial court to enter orders after notice of appeal has been given, we review the record under a *de novo* standard of review. *Moody v. Sears Roebuck & Co.*, 191 N.C. App. 256, 264, 664 S.E.2d 569, 575 (2008) ("Whether a trial court had jurisdiction to enter an order is a question of law that we review *de novo*"). Pursuant to the *de novo* standard of review, "the court considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *In re Appeal of the Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003).

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III. ANALYSIS

A. Waiver of the Dead Man's Statute

[1] Propounder contends that the trial court's exclusion of oral communications between himself and decedent "irreparably damaged" his case, because he was unable to explain to the jury that his actions were taken in direct response to the requests of decedent. We disagree.

The Dead Man's Statute, formerly N.C. Gen. Stat. § 8-51, is now codified as Rule of Evidence 601(c). *See* N.C. Gen. Stat. § 8C-601(c). On the basis of competency, Rule 601(c) serves to disqualify the testimony of certain witnesses:

(c) *Disqualification of interested persons.*—Upon the trial of an action, . . . a party or a person interested in the event . . . shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest, against the executor, administrator or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise, concerning any oral communication between the witness and the deceased person or lunatic. However, this subdivision shall not apply when:

- (1) The executor, administrator, survivor, committee or person so deriving title or interest is examined in his own behalf regarding the subject matter of the oral communication.
- (2) The testimony of the lunatic or deceased person is given in evidence concerning the same transaction or communication.
- (3) Evidence of the subject matter of the oral communication is offered by the executor, administrator, survivor, committee or person so deriving title or interest.

N.C. Gen. Stat. § 8C-601(c)(1)-(3). Rule 601(c) excludes a witness' testimony when it is shown " (1) that such witness is a party, or interested in the event, (2) that his testimony relates to a personal transaction or communication with the deceased person, (3) that the action is against the personal representative of the deceased or a person deriving title or interest from, through or under the deceased, and (4) that the witness is testifying in his own behalf or interest." *In re Will of Lamparter*, 348 N.C. at 51, 497 S.E.2d at 695 (citation omitted).

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In this case, propounder does not take issue with the fact that his excluded testimony was covered by the Dead Man's Statute. Instead, he contends that the protection of the Dead Man's Statute was waived by caveator when caveator was either examined about or offered evidence concerning the subject matter of the conversations with the decedent. Citing *Carswell v. Greene*, 253 N.C. 266, 116 S.E.2d 801 (1960) and *Breedlove v. Aerotrim, U.S.A., Inc.*, 142 N.C. App. 447, 543 S.E.2d 213 (2001), propounder's position is that the excluded testimony should have been admitted because caveator "opened the door." Propounder challenges the exclusion of evidence concerning two conversations with decedent.

First, propounder addresses the exclusion of evidence of a conversation between decedent and caveator. At trial, caveator testified concerning the events of the night of 13 May 2007 and the afternoon of 14 May 2007. During this time frame, caveator testified that decedent, his mother, who was ill with advanced cancer, became angry at him when he asked her to eat some lamb broth and other food he had prepared for her. Subsequently, caveator testified that he went to get candy for his mother, and when he returned, she was missing. A search ensued, during which the mother was located at a neighbor's house. The next morning, she asked him to leave her apartment.

A review of the testimony illustrates that caveator's lawyer asked a series of questions concerning these events which were worded in a manner that would not require caveator to repeat oral communications between himself and decedent. Nevertheless, during caveator's answers at trial, caveator mentioned several things that decedent said to him:

Q: Ms. Gregory referred to an argument. Was there any sort of argument that night?

A: At the table. Over eating. Pushing her to eat and her getting acrimonious. And I said, "You're not going to get well if you don't eat." And that's the wrong thing to say to my Mother. That's talking negative and she didn't like to be talked negative to. She said, "I'll get well. I don't have to." . . .

. . . .

Q: All right. Did your mother make it clear to you that morning that she wanted you to leave?

A: Yes. She did. She made it very clear that I had to leave.

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At trial, propounder attempted to present his version of these events occurring between decedent and caveator. During a voir dire examination outside the presence of the jury, propounder described his first meeting with decedent after caveator had left her apartment:

Q: How long was it before you got into the apartment that [decedent] made mention of [caveator]?

A. In a few more minutes, maybe five.

Q. Did she make any explanation to you of why he wasn't there?

A. Yes.

Q. What did she tell you?

Mr. Mahoney: That's objectionable, Judge.

Mr. McPherson: Go forward.

The Witness: She said that she kicked him out, got the keys away from him. . . .

Q. Did she offer any reason why she kicked him out?

Mr. Mahoney: Objection.

A. Yes, she said that he became violent.

Q. Did she amplify on that?

A. Yes.

Q. What else did she say.

A. She said he started throwing dishes, breaking them, and kicking the furniture and she said he used the F word. I said, how. She said that he yelled at me and I was afraid of him. He said, can't you understand you're dying, you stupid, old, f_ _ _ woman.

Propounder next challenges the trial court's decision to exclude his testimony concerning a conversation that he allegedly had with decedent in which she requested that he travel to New York to see her immediately. Had propounder been permitted to testify concerning the second of these two conversations, he would have stated that:

Well, how did it start? She said, "Can you come?" No, no. I said, "I want to come see you before things go bad. Next thing she said," "When can you come?" Without waiting for an answer, she said, "Can you come today?" And I said, "No, I don't know if there is

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any flights from Albuquerque today, but I'll let you know when I can come after I talk to the airlines."

Propounder summarized this second conversation with decedent by saying that "[s]he wanted me to go there today, and I couldn't." After a lengthy discussion with counsel, the trial court sustained caveator's objections to the above testimony. In addition, the trial court examined the prior depositions taken by caveator. The trial court's reasoning concerning the issue of whether the protection of the Dead Man's Statute had been waived is summarized in the following ruling:

I looked at each of the portions of the transcript of [propounder's] deposition that you've described and I've tried to read enough of it . . . to understand the full context of the question. On each of these occasions when Mr. Mahoney asked, did they have a conversation, he doesn't follow with, what was that conversation. I think in order for there to be a waiver, he would have had to attempt to elicit the conversations with a question like that[.]

I do believe he would have had to ask, what was that conversation or what did she say. He doesn't do that on any of these occasions that you cite.

The court's ruling highlights the problematic nature of the post-1983 revision of the Dead Man's Statute. Under the pre-1983 formulation, the Dead Man's Statute prohibited testimony about both conversations and transactions. The current formulation prohibits only oral communications. N.C.R. Evid. 601 commentary ("The Dead Man's Statute will now be applicable only to oral communications[.]"). This proscription as to oral communications contrasts starkly with the waiver rules in subsections (1) and (3) of Rule 601(c), which require an examination of the broader category of "subject matter of the oral communication" to determine whether the door has been "opened." N.C.R. Evid. 601(c)(1), (3). The commentary to Rule 601 advises further that "[i]t was not the intent of the drafters of subdivision (c) to change any existing cases where the Dead Man's Statute has been held to be inapplicable, or where, because of the actions of one party or the other the protection of the rule has been held to be waived." N.C.R. Evid. 601 commentary. Under former section 8-51, one party could open the door to the presentation of evidence concerning the oral communications of a decedent for an adverse party if the waiving party put on evidence concerning a mere transaction. *See, e.g., Hayes v. Ricard*, 244 N.C. 313, 93 S.E.2d 540 (1956) (documents proffered by plaintiffs concerning title to real property in issue via decedent's

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attorney held to “open the door” to rebuttal evidence from defendant, including testimony of conversations between decedent’s attorney and decedent and events surrounding some documents offered by plaintiffs). Therefore, it appears that the restriction of Rule 601(c) to oral communications, the seemingly easy means by which the Dead Man’s Statute may be waived by inquiring merely into “subject matter” rather than oral communications, and the explicit saving of our old case law under former section 8-51 make the issue of waiver under the Dead Man’s Statute very murky water.³

The mandates of Rule 601(c) and our prior case law on the issue of whether an interested party has “opened the door” and waived the protection of the Dead Man’s Statute, has led to the rule that: if the question propounded by counsel to his own witness or an adverse witness specifically requires the witness to repeat oral communications with the deceased, then there has been a waiver under Rule 601(c)(1) or (3) by the party propounding the question. If, on the other hand, the question propounded by counsel to his own witness does not specifically require the witness to repeat oral communications with the deceased, and the answer given by his own witness provides an oral communication with the deceased, then there has also been a waiver under Rule 601(c)(1) or (3) by the answering party.

In this case, the trial court did not apply this rationale to the evidence before it, and if it had, the record shows that caveator’s remarks concerning the oral communications with decedent, though unsolicited by his counsel, should have resulted in a waiver of the protection of the Dead Man’s Statute to the extent of the subject matter testified to by caveator. *Godwin v. Tew*, 38 N.C. App. 686, 688, 248 S.E.2d 771, 773 (1978) (“When the door is thus opened for the adverse party, it is only opened to the extent that he may testify as to the transaction about which he was cross-examined.”). Likewise, caveator waived his Rule 601(c) objection to propounder’s testimony concerning the reasons for his visit to New York because caveator’s attorney questioned propounder thereupon during propounder’s deposition. Reviewing the trial court’s ruling *de novo*, we therefore find that the trial court erred by failing to find waiver had occurred under Rule 601(c) and thereafter excluding the proffered evidence. However, given the requirement that prejudice be shown as a precondition for an award of appellate relief, we will further examine

3. For further commentary on this subject see Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 145 (6th ed. 2004).

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whether or not the exclusion of propounder's rebuttal evidence "irreparably harmed" or was prejudicial to propounder's case on the jury question of undue influence.

Undue influence "is exerted by various means of a kind that so overpowers and subjugates the mind of the testator as to destroy his free agency, and to make him execute a will, which, although his, in outward form, is in reality not his will, but the will of another person, which is substituted for that of the testator." *In re Will of Thompson*, 248 N.C. 588, 593, 104 S.E.2d 280, 284 (1958).

Undue influence is frequently employed surreptitiously, and is chiefly shown by its results. When the issue of undue influence is raised, the question presented is usually one of the effect of a long course of conduct upon the mind of the testator at the time the will is made, and the evidence by which it is established is usually circumstantial.

Id. "There are four general elements of undue influence: (1) a person who is subject to influence; (2) an opportunity to exert influence; (3) a disposition to exert influence; and (4) a result indicating undue influence." *In re Will of Dunn*, 129 N.C. App. 321, 328, 500 S.E.2d 99, 104 (1998) (quoting *Griffin v. Baucom*, 74 N.C. App. 282, 286, 328 S.E.2d 38, 41 (1985)).

Our readings of the transcript, which contained the evidence which would have been introduced but for the trial court's ruling, does not persuade us that the admission of the challenged testimony would have resulted in a different decision by the jury. Propounder's argument—that a full explanation of the altercation taking place on 13 and 14 May 2007 would have shed a different light on the events taking place between 23 May 2007 to 12 June 2007—is not well founded in light of the weight of the other evidence adduced at trial by caveator.

At the time of the execution of the will, decedent was of advanced age, seventy-six years old, and suffering in Duke University Hospital from terminal uterine sarcoma. According to her medical records, the cancer had metastasized into her lungs and liver; and at the time the will was signed, decedent appeared sickly, feeble, and in poor physical condition. During this time, decedent was also dependent upon propounder to sign medical releases at the hospital. Caveator testified that his phone calls to speak to his mother went unreturned. The attorney who drafted the will was procured by propounder, and propounder was present during the interview with the paralegal who

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prepared the will. Propounder made transfers of sums of cash from his aunt's accounts prior to her death, which had the effect of maximizing his post-death inheritance to the exclusion of his sisters when decedent had specifically included the sisters in beneficiary designations. There was extensive evidence demonstrating propounder's impatience in connection with the execution of the will and the power of attorney, and the rapid pace that propounder moved money and accounts as soon as he had the ability to do so. These events occurred within the immediate time frame of the execution of the will, and specifically concern indicia our appellate courts have held to be highly probative on the issue of undue influence. *In re Will of Sechrest*, 140 N.C. App. 464, 469, 537 S.E.2d 511, 515 (2000); *see* N.C.P.I., Civ. 860.20 (gen. civ. vol. 2006).

The excluded evidence tended to show that decedent became very angry at caveator on the evening of 13 May 2007 because he treated her badly and that propounder came to New York following that incident at decedent's request. Despite the trial court's decision to exclude evidence of propounder's testimony concerning decedent's version of the events that occurred between caveator and decedent on the evening of 13 May 2007, the jury heard other evidence that caveator threw and broke a dish on that occasion, that he acted aggressively toward decedent, that his conduct angered and frightened her, and that she expelled him from her apartment. Similarly, despite the trial court's decision to exclude propounder's version of his conversation with decedent about coming to and the timing of his trip to New York, the record contains ample evidence that decedent had a falling-out with caveator and that propounder took many other actions at decedent's request.

The evidence excluded by the trial court and sought to be admitted by propounder is tangential, at best, on the issue of the undue influence. In an undue influence case, the issue is not how severely the decedent was estranged from her next-of-kin, but to what extent the person asserting the influence had on the execution of a will on the decedent. On balance, we are not convinced that the evidence omitted would have persuaded the jury on the issue of undue influence.

Since the evidence sought to be admitted by propounder would not have swayed the jury's decision on undue influence, it was not prejudicial error by the trial court to exclude the evidence. The trial court's error does not justify an award of appellate relief in that the jury heard the same or similar evidence during the course of the trial.

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State v. Richardson, 341 N.C. 658, 671, 462 S.E.2d 492, 501 (1995) (holding that any error in the exclusion of certain evidence “was harmless because defendant elicited substantially the same evidence through other witnesses”). In addition, given the fact that an undue influence claim is necessarily focused on the events that surrounded the execution of the disputed will and the fact that the evidence that propounder came to New York at decedent’s request regarding an event that occurred over a month prior to the execution of the disputed will, evidence concerning the reason for the timing of propounder’s trip to New York would not have had any significant impact on the jury’s verdict with respect to the undue influence issue. As a result, the erroneous exclusion of the evidence concerning decedent’s statements to propounder about the events that occurred on the evening of 13 May 2007 and the reason for the timing of propounder’s trip to New York was, under the facts of this case, harmless error.

B. Fiduciary Duty Jury Instruction

[2] Propounder argues that the jury instruction given by the trial court regarding a fiduciary relationship erroneously established the legal presumption of undue influence, and unfairly shifted the burden of proof. We disagree.

The instruction challenged by propounder reads, in part, as follows:

In addition, Caveator has offered evidence that a fiduciary relationship existed between the Deceased and [propounder] when Propounder[']s Exhibit 1 was executed. Caveator has the burden to prove by the greater weight of the evidence that a fiduciary relationship, in fact, existed. A fiduciary is a person in whom another person has placed special faith, confidence and trust. Because of the trust and confidence placed in him by another person, a fiduciary is required to act honestly, in good faith and in the best interest of that person.

A fiduciary relationship may exist in a variety of circumstances. Anytime one person places special faith, confidence and trust in another person to represent his best interest, a fiduciary relationship exists. It is not necessary that it be a technical or legal relationship. By law a fiduciary relationship exists between principals and their agents under a power of attorney. If you find by the greater weight of the evidence that a fiduciary relationship existed between the Deceased and [propounder] when Propounder[']s Exhibit 1 was executed, then the law presumes that the will was produced by undue influence—excuse me, procured by undue influence.

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If you find the existence of a fiduciary relationship, the Propounders may rebut the presumption by proving with evidence of equal weight that Propounder[']s Exhibit 1 was the free and voluntary act of the Deceased. In any event, the burden remains upon Caveator to prove, by the greater weight of the evidence, that the execution of Propounder[']s Exhibit 1 was procured by undue influence. Finally, as to this issue on which the Caveator has the burden of proof.

If you find, by the greater weight of the evidence, that the execution of Propounder[']s Exhibit 1 was procured by undue influence, then it would be your duty to answer this issue yes, in favor of the Caveator. If, on the other hand, you fail to so find, then it would be your duty to answer this issue no, in favor of the Propounders.

The evidence adduced at trial clearly shows that decedent and propounder had developed a close, trusting relationship. The issue the trial court faced was whether or not this relationship had been sufficiently formalized to shift the burden of proof to propounder to show that he did not take advantage of this relationship. Propounder did not request an instruction at the jury instruction conference on this countervailing issue. Furthermore, our review of the record shows that propounder did not offer any rebuttal evidence showing that he took no advantage of his position. Clearly, the excluded evidence discussed *supra* does not rebut caveator's showing, because it contains no discussion of the disposition of decedent's estate resulting from acts taking place after decedent left New York.

The evidence at trial was conflicting as to when and whether propounder and decedent had, in fact, established a principal-agent relationship by the execution of a power of attorney. The above instruction shows that the trial court, in an effort to properly instruct the jury and to provide for the shifting burden, did not conclusively instruct the jury that a fiduciary relationship did, in fact, exist. Rather, the trial court instructed the jury as to the legal consequences of a principal-agent relationship, if one existed, and then treated the issue as a factual matter for jury resolution. If the trial court had intended to inform the jury that a fiduciary relationship existed, as a matter of law, the pattern jury instruction provides the following: "In this case, members of the jury, [Propounder and the Decedent] had a relationship of [agent and principal]. You are instructed that, under such circumstances, a relationship of trust and confidence existed." N.C.P.I., Civ. 501.55 (gen. civ. vol. 2003). The trial court here did not

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use this instruction, and instead left open the question of whether a fiduciary relationship existed, placing the burden squarely on caveator to prove its existence. The modified instruction did not usurp the jury's duty to weigh the evidence of a fiduciary duty and did not incorporate a mandatory presumption. The jury made its own determination as to whether or not a fiduciary relationship existed based on all evidence it had heard.

Propounder's reliance on *In re Estate of Ferguson*, 135 N.C. App. 102, 518 S.E.2d 796 (1999), is misplaced. In *Ferguson*, we held that the trial court did not err by declining to give the jury an instruction on the effect of the existence of a fiduciary relationship because the record showed that, while a power of attorney was executed at the same time as the will in issue, the power of attorney was not delivered to the propounder until eighteen months after its execution. *Id.* at 105, 518 S.E.2d at 798. Since the fiduciary relationship alleged by the caveator was based solely on the belated power of attorney, we held that the omission of a fiduciary relationship jury instruction was not error. *Id.* at 105, 518 S.E.2d at 799.

In this case, the will and power of attorney were not signed simultaneously, and the evidence was sufficient to permit a reasonable person to conclude that propounder began acting as decedent's agent in advance of the execution of the written power of attorney in both financial and health-related matters. Propounder was present for critical estate planning decisions, and orchestrated the procurement of the will and the power of attorney. Immediately after the execution of the power of attorney, which occurred one day before the will was executed, propounder began acting based on its authority.

The facts of this case clearly support the trial court's instruction. The instruction correctly placed the burden on caveator, and the jury agreed that caveator had met his burden of proof. Because the trial court's instruction correctly stated the law and did not mislead the jury, it was properly given. This assignment of error is overruled.

C. Attorneys' Fees and Costs

Propounder lastly claims that the trial court erred in entering its order awarding caveator's attorneys' fees and costs, because (1) the trial court lacked jurisdiction under N.C. Gen. Stat. § 1-294 (2009) and (2) a reversal of this case on appeal in this Court would show that caveator's proceeding lacked substantial merit. We disagree.

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As to the first argument, this Court has already held that a trial court may enter an award of attorneys' fees following notice of appeal from a prior judgment in a caveat proceeding, section 1-294 notwithstanding. *In re Will of Dunn*, 129 N.C. App. 321, 329-30, 500 S.E.2d 99, 104-05 (1998) ("The trial court's decision to award costs and attorneys' fees was not affected by the outcome of the judgment from which caveator appealed; therefore, the trial court could properly proceed to rule upon the petitions for costs and attorneys' fees after notice of appeal had been filed and served."); *cf. McClure v. County of Jackson*, 185 N.C. App. 462, 470, 648 S.E.2d 546, 551 (2007) (holding that *Dunn* is limited to caveat proceedings). Regarding propounder's second argument, we have already held that there was no prejudicial error in the judgment. This assignment of error is overruled.

IV. CONCLUSION

For the reasons set forth above, we find

No prejudicial error.

Judges McGEE and ERVIN concur.

STATE OF NORTH CAROLINA v. CURTIS C. COWAN

No. COA09-1415

(Filed 21 September 2010)

1. Appeal and Error— appeal noted orally—treated as motion for certiorari

An appeal from an order requiring defendant to enroll in life-time satellite-based monitoring that was noted orally in open court was not sufficient to confer jurisdiction on the Court of Appeals, but was considered as a petition for *certiorari* and was granted in the interests of justice.

2. Satellite-Based Monitoring— applicable date of statute

The trial court did not err by using N.C.G.S. § 14-208.40B as the procedural vehicle for determining whether defendant should be required to enroll in satellite-based monitoring (SBM). That statute applies to SBM proceedings initiated after 1 December 2007 even if those proceedings involved offenders who had been sentenced or had committed their offenses before that date.

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3. Constitutional Law— ex post facto—satellite-based monitoring

There was no merit to defendant's contention that state and federal constitutional prohibitions of *ex post facto* laws were violated by an order subjecting him to lifetime enrollment in satellite-based monitoring (SBM) despite the fact that the SBM regime did not exist when he committed the acts which led to his conviction.

4. Satellite-Based Monitoring— eligibility—solicitation to take indecent liberties

Assuming that eligibility for satellite-based monitoring (SBM) should be determined based on the elements of the offense rather than on the event, solicitation to take an indecent liberty with a minor (the offense of which defendant was convicted) inherently involves the physical, mental, or sexual abuse of a minor as required for SBM.

5. Satellite-Based Monitoring— notice—inadequate

Defendant did not receive adequate notice of the Department of Correction's preliminary determination that he should be required to enroll in satellite-based monitoring where the notice did not specify the category of N.C.G.S. § 14-208.40(a) into which the Department had determined that defendant fell, nor did it briefly state the factual basis for the conclusion.

Judge ELMORE concurs in the result only.

Appeal by defendant from order entered 17 April 2009 by Judge John L. Holshouser, Jr., in Rowan County Superior Court. Heard in the Court of Appeals 15 April 2010.

Attorney General Roy Cooper, by Assistant Attorney General Catherine M. (Katie) Kayser, for State.

Robert W. Ewing, for defendant.

ERVIN, Judge.

Defendant Curtis C. Cowan appeals from a trial court order requiring him to enroll in lifetime satellite-based monitoring (SBM). After careful consideration of Defendant's challenges to the trial court's order in light of the record and the applicable law, we conclude that the trial court's order should be vacated and that this case should

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be remanded to the trial court for a new SBM hearing to be held only after proper notice is given to Defendant.

I. Factual Background

On 6 June 2005, a warrant for arrest charging Defendant with taking indecent liberties with a child was issued. On 11 July 2005, the Cabarrus County grand jury returned a bill of indictment charging Defendant with taking indecent liberties with a child. On 29 August 2007, the prosecutor, with Defendant's consent, signed an information charging Defendant with solicitation to take indecent liberties with a child. On the following day, Defendant entered pleas of guilty to one count of attempted second degree kidnapping and one count of solicitation to commit indecent liberties with a child. In return for Defendant's guilty pleas, the State voluntarily dismissed a statutory sexual offense charge, an intimidating a witness charge, a breaking or entering charge, and an habitual felon allegation. Based upon Defendant's guilty pleas, Judge W. Robert Bell entered judgments sentencing Defendant to a minimum term of 15 months and a maximum term of 20 months imprisonment in the custody of the North Carolina Department of Correction for attempted second degree kidnapping and sentencing Defendant to a consecutive minimum term of 9 months and a maximum term of 11 months in the custody of the Department of Correction for solicitation to take indecent liberties with a child. Judge Bell suspended Defendant's sentence for solicitation to take indecent liberties with a child and placed Defendant on supervised probation for a period of 36 months, subject to a number of terms and conditions. On 15 February 2008, Defendant elected to serve his suspended sentence rather than remain on supervised probation.

On 5 January 2009, the State scheduled a hearing to determine whether Defendant should be required to enroll in SBM. By means of a letter dated 8 January 2009, the Department of Correction notified Defendant of its initial determination that he was subject to SBM. The issue of whether Defendant should be required to enroll in SBM came on for hearing before the trial court on 6 March 2009 and 17 April 2009.

At the 6 March 2009 hearing, Probation Officer Lisa Foust stated that the results of Defendant's Static-99 risk assessment indicated that he had a "high risk for reoffending." In addition, Ms. Foust stated that she had obtained the "official crime version of what happened that Cabarrus County constructed after he was sentenced" and that this report indicated that Defendant had penetrated the four-year-old victim. On 17 April 2009, the trial court found that Defendant had

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committed a reportable offense “involv[ing] the physical, mental or sexual abuse of a minor” and ordered him to enroll in SBM for “the remainder of [his] natural life.” Defendant noted an appeal to this Court from the trial court’s order.

II. Legal Analysis

A. Appropriateness of Defendant’s Notice of Appeal

[1] The first issue that we must address is the extent, if any, to which Defendant’s appeal is properly before this Court. Defendant’s appeal from the trial court’s order requiring him to enroll in lifetime SBM was noted orally in open court. According to *State v. Brooks*, — N.C. App. —, —, 693 S.E.2d 204, 206 (2010), “oral notice pursuant to N.C.R.App. P. 4(a)(1) is insufficient to confer jurisdiction on this Court” in a case arising from a trial court order requiring a litigant to enroll in SBM. “Instead, a defendant must give notice of appeal pursuant to N.C.R.App. P. 3(a) as is proper ‘in a civil action or special proceeding.’” *Id.* (quoting N.C.R. App. P. 3(a). N.C.R. App. P. 3(a) (2010) provides that appeals to the appellate courts in civil actions and special proceedings are required to be in writing, filed with the Clerk of Superior Court, and served upon all other parties. As a result of the fact that Defendant noted his appeal orally, rather than in writing, and the fact that “[t]he provisions of [N.C.R. App. 3] are jurisdictional,” *Stephenson v. Bartlett*, 177 N.C. App. 239, 241, 628 S.E.2d 442, 443 (quoting *Abels v. Renfro Corp.*, 126 N.C. App. 800, 802, 486 S.E.2d 735, 737 (1997); (citing *Currin-Dillehay Bldg. Supply Inc. v. Frazier*, 100 N.C. App. 188, 189, 394 S.E.2d 683 (1990), *disc. review denied*, 360 N.C. 544, 635 S.E.2d 58 (2006), we are required to dismiss Defendant’s appeal.

In addition to attempting to use his oral notice as a means of invoking this Court’s jurisdiction, Defendant has requested that we treat his brief as a petition for certiorari in the event that we found his oral notice of appeal to be ineffective. According to N.C.R. App. P. 21(a)(1) (2010), “[t]he writ of *certiorari* may be issued by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute on appeal has been lost by failure to take timely action.” The effect of this Court’s decision in *Brooks* is that Defendant was required to note an appeal from the trial court’s SBM order in writing was that Defendant failed to note an appeal from the trial court’s order in a timely manner, which is one of the reasons for which this Court is authorized to issue a writ of certiorari. We note that this Court’s decision in *State v. Bare*, — N.C. App. —, —, 677 S.E.2d 518, 524 (2009), which held that North Carolina’s SBM statutes constituted a

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civil and regulatory regime rather than a criminal punishment, was decided on 16 June 2009. This Court further explained in *State v. Singleton*, — N.C. App. —, —, 689 S.E.2d 562, 565-66, *disc. review allowed*, 364 N.C. 131, — S.E.2d (2010), which was decided on 5 January 2010, that, “for purposes of appeal, a[n] SBM hearing is not a ‘criminal trial or proceeding’ for which a right of appeal is based upon N.C. Gen. Stat. § 15A-1442 or N.C. Gen. Stat. § 15A-1444,” so that jurisdiction to hear appeals from SBM hearings stems from N.C. Gen. Stat. § 7A-27. Finally, our decision in *Brooks* was issued on 18 May 2010. Defendant’s appeal was noted on 17 April 2009, approximately two months before *Bare*, nine months before *Singleton*, and thirteen months prior to *Brooks*. As a result, at the time of his SBM hearing, Defendant would have needed a considerable degree of foresight in order to understand that an oral notice of appeal pursuant to N.C.R. App. P. 4(a)(1) was ineffective. Accordingly, “[i]n the interest of justice, and to expedite the decision in the public interest,” *Brooks*, — N.C. App. at —, 693 S.E.2d at 206, we grant defendant’s request that we consider his brief as a petition for the issuance of a writ of certiorari, issue the writ, and consider his challenges to the trial court’s SBM order on the merits. *See also State v. Clayton*, — N.C. App. —, —, — S.E.2d —, —, 2010 N.C. App. Lexis 1451 *7 (2010).

B. Effective Date of N.C. Gen. Stat. § 14-208.40B

[2] First, Defendant contends that the provisions of N.C. Gen. Stat. § 14-208.40B do not apply to cases involving offenses committed prior to the effective date of that statutory subsection. In essence, Defendant argues that, since N.C. Gen. Stat. § 14-208.40B is the only statutory vehicle under which individuals whose eligibility for SBM was not determined at the time that judgment was imposed can be ordered to enroll in SBM and since the offense upon which Defendant’s eligibility for SBM was predicated was committed before the effective date of N.C. Gen. Stat. § 14-208.40B, the trial court lacked the authority to require individuals, such as Defendant, who committed crimes prior to the effective date of N.C. Gen. Stat. § 14-208.40B and whose eligibility for SBM was not determined at the time that judgment was imposed, to enroll in SBM. We disagree.

The original SBM statutes became effective on 16 August 2006 and applied (1) to any offenses “committed on or after that date” and (2) to “any person sentenced to intermediate punishment on or after that date and to any person released from prison by parole or post-release supervision on or after that date.” 2006 N.C. Sess. L., c. 247, s.

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15(1). On 11 July 2007, the Governor signed legislation enacting N.C. Gen. Stat. § 14-208.40A and N.C. Gen. Stat. § 14-208.40B, which established the procedures that were to be utilized in determining whether particular offenders would be required to enroll in SBM, among other SBM-related provisions. According to 2007 N.C. Sess. L., c. 213, s. 15:

Section 2 of this act [N.C. Gen. Stat. § 14-208.40A] becomes effective December 1, 2007, and applies to sentences entered on or after that date. Section 6 of this act [failure to enroll a felony] becomes effective December 1, 2007, and applies to offenses committed on or after that date. Sections 7 [conditions of probation], 8 [conditions of parole] and 9 of this act [other post-release conditions] become effective on December 1, 2007 and apply to persons placed on probation, parole, or post-release supervision on or after that date. Section 9A [reporting requirements amended] becomes effective December 1, 2007. The remainder of this act [including Section 3, which contained N.C. Gen. Stat. § 14-208.40] is effective when it becomes law.

Thus, N.C. Gen. Stat. § 14-208.40B initially became effective 11 July 2007. However, 2007 N.C. Sess. L., c. 484, s. 42, a technical corrections bill enacted on 2 August 2007, changed the effective date of N.C. Gen. Stat. § 14-208.40B from 11 July 2007 to 1 December 2007. Thus, except for its applicability during the brief period of time between 11 July 2007 and 2 August 2007, N.C. Gen. Stat. §14-208.40B took effect on 1 December 2007.

Judge Bell entered judgment against Defendant in the solicitation to take indecent liberties with a minor case on 30 August 2007, with his crime allegedly having been committed on 1 April 2005. The issue of Defendant's eligibility for SBM was not addressed at the time that judgment was entered. As of 1 December 2007, no hearing had been held for the purpose of determining whether Defendant should be required to enroll in SBM. According to N.C. Gen. Stat. § 14-208.40B, "[w]hen an offender is convicted of a reportable conviction as defined by [N.C. Gen. Stat. §] 14-208.6(4), and there has been no determination by a court on whether the offender shall be required to enroll in satellite-based monitoring . . .," the Department of Correction is authorized to institute a proceeding to determine Defendant's eligibility for SBM. N.C. Gen. Stat. § 14-208.40B(a). As a result, since Defendant had a reportable con-

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viction¹ and since his eligibility for SBM had not yet been determined, the procedures set out in N.C. Gen. Stat. § 14-208.40B provide an appropriate vehicle for use in determining whether Defendant should be required to enroll in SBM, as long as they are applicable in cases involving offenders convicted prior to 1 December 2007.

The issue of whether the State was entitled to seek to have Defendant enrolled in SBM pursuant to the procedures outlined in N.C. Gen. Stat. § 14-208.40B is, at least in the first instance, a matter of statutory construction. “The principal goal of statutory construction is to accomplish the legislative intent.” *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (citing *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998)). “The best indicia of that intent are the language of the statute . . . , the spirit of the act and what the act seeks to accomplish.” *Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) (citing *Stevenson v. City of Durham*, 281 N.C. 300, 188 S.E.2d 281 (1972)). “[S]tatutes dealing with the same subject matter must be construed *in pari materia*, as together constituting one law.” *Bare*, — N.C. App. at —, 677 S.E.2d at 523 (quoting *Williams v. Alexander County Bd. of Educ.*, 128 N.C. App. 599, 603, 495 S.E.2d 406, 408 (1988)) (citation and quotation marks omitted). “In discerning the intent of the General Assembly, statutes *in pari materia* should be construed together and harmonized whenever possible.” *Id.* (quoting *State v. Jones*, 359 N.C. 832, 836, 616 S.E.2d 496, 498 (2005)).

The basic legal principles underlying the SBM program are set out in N.C. Gen. Stat. § 14-208.40, which is essentially identical to former N.C. Gen. Stat. § 14-208.33.² 2006 N.C. Sess. L., c. 247, s. 15. In essence, N.C. Gen. Stat. § 14-208.40 and its predecessor required the Department of Correction to create the SBM program and set out various substantive provisions identifying the individuals who should be required to enroll in that program. N.C. Gen. Stat. § 14-208.40A, which applies to SBM-related determinations made at the time of sentencing, and N.C. Gen. Stat. § 14-208.40B, which, as we have previously noted, applies to SBM-related determinations made after sentencing,

1. In his brief, Defendant contends that he did not have a reportable conviction of the type necessary for SBM eligibility. However, the validity of Defendant’s contention hinges on acceptance of his claim that N.C. Gen. Stat. § 14-208.40B has no application to his situation. Given our disagreement with Defendant’s position on that issue, we are unable to accept his contention that he lacked the necessary reportable conviction as well.

2. The only difference between the two statutory provisions is that N.C. Gen. Stat. § 14-208.40(a)(3) provides that “offenders . . . convicted of [violating N.C. Gen. Stat.

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were enacted for the purpose of establishing the procedures to be utilized in determining whether specific individuals were required to enroll in SBM. As a result, we conclude that N.C. Gen. Stat. § 14-208.40A and N.C. Gen. Stat. § 14-208.40B were intended to augment, and not to supersede, N.C. Gen. Stat. § 14-208.40 and its predecessor and must be interpreted *in pari materia* with each other and with N.C. Gen. Stat. § 14-208.40 so as to avoid the creation of conflicts among and gaps in the relevant statutory provisions. The most appropriate way to accomplish that goal is to construe N.C. Gen. Stat. § 14-208.40 as setting out the substantive law concerning SBM eligibility and to construe N.C. Gen. Stat. § 14-208.40A and N.C. Gen. Stat. § 14-208.40B as governing the procedures to be utilized in applying the substantive rules set out in N.C. Gen. Stat. § 14-208.40. The adoption of any other approach would create a risk that conflicting substantive SBM-related rules would exist.

In view of the fact that the original SBM legislation, which was effective at the time that judgment was imposed upon Defendant, applied to any offenders “sentenced to intermediate punishment on or after” 16 August 2006, 2006 N.C. Sess. L., c. 247, s. 15(1), and the fact that Defendant received a probationary sentence on 30 August 2007, it is clear that Defendant was subject to the possibility of an SBM enrollment requirement as a matter of substantive law from and after the date upon which he pled guilty to solicitation to take indecent liberties with a minor. Since, as we have already established, the provisions of N.C. Gen. Stat. § 14-208.40B are essentially procedural in nature and since “statutes relating to modes of procedure are generally held to operate retroactively,” *State v. Green*, 350 N.C. 400, 404-05, 514 S.E.2d 724, 727 (1999) (citing *Smith v. Mercer*, 276 N.C. 329, 338, 172 S.E.2d 489, 495 (1970), *cert. denied*, 540 S.E.2d 351 (1999)),³ we conclude that N.C. Gen. Stat. § 14-208.40B applies to SBM proceedings initiated after

§ 14-27.2A or N.C. Gen. Stat. § 14-27.4A) shall be enrolled in [SBM] for the offender’s natural life” while there is no equivalent provision in former N.C. Gen. Stat. § 14-208.33.

3. In light of our conclusion that N.C. Gen. Stat. § 14-208.40B is a procedural, rather than a substantive statute, we disagree with Defendant’s reliance on the principle that “statutes are presumed to act prospectively only,” *Fogleman v. D & J Equipment Rentals, Inc.*, 111 N.C. App. 228, 431 S.E.2d 849 (1993) (citing *Lee v. Penland-Bailey Co.*, 50 N.C. App. 498, 500, 274 S.E.2d 348, 350 (1981)) *disc. review denied*, 335 N.C. 172, 436 S.E.2d 374 (1993), since it is clear from the context of our decision in *Fogleman* that the principle upon which Defendant relies applies to statutory provisions that “alter the legal consequences of conduct or transactions completed prior to its enactment.” *Id.* (quoting *Gardner v. Gardner*, 300 N.C. 715, 718, 268 S.E.2d 468, 471 (1980)). Since Defendant was potentially subject to a requirement that he enroll in SBM for reasons completely unrelated to the enactment of N.C. Gen. Stat. § 14-208.40B, the principle upon which Defendant relies has no application to the present situation.

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1 December 2007, even if those proceedings involved offenders who had been sentenced or had committed the offenses that resulted in their eligibility for SBM before that date.⁴ Acceptance of Defendant's argument to the contrary would create an anomalous situation under which offenders whose SBM eligibility was evaluated at the time of sentencing could be required to enroll in SBM, while those whose eligibility for SBM was not evaluated at that time could not be ordered to enroll solely because SBM-related issues were not addressed at sentencing. We do not believe that the General Assembly intended such a result. Thus, the trial court did not err by utilizing N.C. Gen. Stat. § 14-208.40B as the procedural vehicle for determining whether Defendant should be required to enroll in SBM.

C. Constitutionality of the SBM Program

[3] Secondly, Defendant contends that the statutory scheme providing for an offender's enrollment in SBM is punitive in nature and that, for that reason, the trial court's order subjecting him to enrollment in lifetime SBM despite the fact that the SBM regime did not exist as of the date upon which he committed the acts that led to his conviction for solicitation to take indecent liberties with a child violates the state and federal constitutional provisions against *ex post facto* laws. This Court has repeatedly held that the statutory provisions requiring that certain offenders enroll in SBM constitute a civil, regulatory scheme rather than a criminal punishment and that a trial court order requiring a defendant similarly-situated to Defendant to enroll in SBM does not result in a violation of the constitutional prohibitions against *ex post facto* laws, *State v. Vogt*, — N.C. App. —, —, 685 S.E.2d 23, 27 (2009); *State v. Morrow*, — N.C. App. —, —, 683 S.E.2d 754, 758, *disc. review as to additional issues denied*, 363 N.C. 747, 689 S.E.2d 372 (2009); *State v. Wagoner*, — N.C. App. —, —, 683 S.E.2d 391, 399 (2009); *Bare*, — N.C. App. at —, 677 S.E.2d at 531, and we are bound by those prior holdings. *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (stating that, “[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court”). As a result, Defendant's contention that requiring a person in his position to enroll in lifetime

4. Although Defendant also urges us to adopt his preferred resolution of the effective date issue in order to avoid constitutional issues arising under the provisions of the state and federal constitutions prohibiting the enactment of *ex post facto* laws, we find this principle of little relevance to our analysis given that, for the reasons set forth below, North Carolina's SBM statutes do not contravene the *ex post facto* provisions of either constitution.

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SBM violates the constitutional prohibition against the enactment of *ex post facto* laws lacks merit.

D. Sufficiency of the Evidence to Support the
Imposition of SBM Upon Defendant

[4] Next, Defendant argues that the trial court erred by finding that he should be required to enroll in SBM on the grounds that “the offense of which the defendant was convicted involved the physical, mental, or sexual abuse of a minor” We disagree.

According to N.C. Gen. Stat. § 14-208.40(a)(2), “[a]ny offender who satisfies all of the following criteria: (i) is convicted of a reportable conviction as defined by [N.C. Gen. Stat. §] 14-208.6(4), (ii) is required to register under Part 2 of Article 27A of Chapter 14 of the General Statutes, (iii) has committed an offense involving the physical, mental, or sexual abuse of a minor, and (iv) based on the Department’s risk assessment program requires the highest possible level of supervision and monitoring” may be required to enroll in SBM. In challenging the trial court’s order, Defendant argues that the determination of whether he had committed an offense involving “the physical, mental, or sexual abuse of a minor” should be based upon an examination of the elements of the offense for which he had been convicted and that an analysis of the elements of solicitation to take indecent liberties with a minor demonstrates that guilt of that offense does not necessarily “involv[e] the physical, mental, or sexual abuse of a minor.” Assuming, without deciding, that an elements-based approach rather than an event-based approach should be utilized in determining Defendant’s eligibility for SBM under N.C. Gen. Stat. § 14-208.40(a)(1) and N.C. Gen. Stat. § 14-208.40B(c), we conclude that the trial court correctly found that Defendant was eligible for SBM.

The elements of taking indecent liberties with a child in violation of N.C. Gen. Stat. § 14-202.1 are that “(1) the defendant was at least 16 years of age, (2) he was five years older than his victim, (3) he willfully took or attempted to take an indecent liberty with the victim, (4) the victim was under 16 years of age at the time the alleged act or attempted act occurred, and (5) the action by the defendant was for the purpose of arousing or gratifying sexual desire.” *State v. Rhodes*, 321 N.C. 102, 104-05, 361 S.E.2d 578, 580 (1987) (citing *State v. Hicks*, 79 N.C. App. 599, 399 S.E.2d 806 (1986)). The “gravamen of the crime of solicitation” to commit a felony is “[c]ounseling, enticing or inducing another to commit a crime,” with such unlawful “[s]olicitation being complete when the request to commit a crime is made, regardless of

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whether the crime solicited is ever committed or attempted.” *State v. Richardson*, 100 N.C. App. 240, 247, 395 S.E.2d 143, 147-48 (1990) (citing *State v. Furr*, 292 N.C. 711, 720, 235 S.E.2d 193, 199, *cert. denied*, 434 U.S. 924, 98 S. Ct. 402, 54 L. Ed. 2d 281 (1977), and *State v. Mann*, 317 N.C. 164, 169, 345 S.E.2d 365, 368 (1986)), *disc. review denied and appeal dismissed*, 372 N.C. 641, 399 S.E.2d 332 (1990). Therefore, the elements of the crime of solicitation to take indecent liberties with a minor are that the defendant (1) requests another person, (2) who is at least 16 years old and (3) five years older than the victim to (4) willfully take or attempt to take an indecent liberty with the victim (5) at a time when the victim was under sixteen years of age (6) for the purpose of arousing or gratifying sexual desire. Thus, the ultimate issue before the trial court, assuming that an elements-based approach of the type required in connection with the “aggravated offense” provision of N.C. Gen. Stat. § 14-208.40(a)(1), *State v. Singleton*, — N.C. App. —, —, 689 S.E.2d 562, 568-69, *disc. review allowed*, 364 N.C. 131, — S.E.2d (2010); *State v. Davison*, — N.C. App. —, —, 689 S.E.2d 510, 517 (2009), must be used in applying the “physical, mental or sexual abuse” provision of N.C. Gen. Stat. § 14-208.40(a)(2), was whether an individual whose conduct is encompassed within the elements of solicitation to take indecent liberties with a child has “committed an offense involving the physical, mental, or sexual abuse of a minor.” In order to properly resolve that question, we must focus on the statutory language requiring the Defendant’s conduct to “involve” the “physical, mental, or sexual abuse of a minor.”

“Involve” is defined as “to have within or as part of itself” or “to require as a necessary accompaniment” *Webster’s Ninth New Collegiate Dictionary* (1991). The fundamental deficiency in Defendant’s challenge to the trial court’s finding is its assumption that, in order for an offense to “involve” the “physical, mental, or sexual abuse of a minor,” actual “physical, mental, or sexual abuse” of the victim must occur. Instead, given the fact that the word “involve” encompasses an act that would have the “physical, mental, or sexual abuse of a minor” as a “necessary feature or consequence” as well as “including or containing” such abuse, we believe that eligibility for SBM under N.C. Gen. Stat. § 14-208.40(a)(2) includes both completed acts and acts that create a substantial risk that such abuse will occur. Thus, an act which rises to the level of a completed taking indecent liberties with a minor inevitably has “within or as part of itself” the “physical, mental, or sexual abuse of a minor.” Similarly, in view of the fact that an unlawful attempt to take indecent liberties with a

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child requires proof of “(1) the intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense,” *State v. Ellis*, 188 N.C. App. 820, 825, 657 S.E.2d 51, 54, *disc. review denied*, 362 N.C. 365, 664 S.E.2d 313 (2008) (quoting *State v. Coble*, 351 N.C. 448, 449, 527 S.E.2d 45, 46 (2000) (citations and quotations omitted)), and the fact that an overt act of the type necessary to permit a finding of liability for attempt may constitute such abuse itself and, at a minimum, inherently encompasses a substantial risk that the sexual abuse of a minor will occur, we conclude that an attempt to take an indecent liberty with a child has “within or as part of itself” “the physical, mental, or sexual abuse of a minor” for purposes of N.C. Gen. Stat. § 14-208.40(a)(2) as well. Finally, although guilt of unlawful solicitation to take an indecent liberty with a minor need not involve the commission of the completed crime, we believe that an effort to “counsel, entice, or induce” another to commit an indecent liberty with a minor also creates a substantial risk that the “physical, mental, or sexual abuse of a minor” will occur, so that such a solicitation has the sexual abuse of a minor “as a “necessary accompaniment.” Thus, since the offense of solicitation to take an indecent liberty with a minor inherently “involves” the “physical, mental, or sexual abuse of a minor,” we conclude that the trial court did not err by concluding that Defendant was subject to enrollment in SBM pursuant to N.C. Gen. Stat. § 14-208.40(a)(2).⁵

E. Notice

[4] Finally, Defendant argues that he did not receive adequate notice of the basis for the Department of Correction’s preliminary determination that he should be required to enroll in SBM. We agree.

The version of N.C. Gen. Stat. § 14-208.40B(b) in effect at the time of Defendant’s SBM proceeding provided that, “[i]f the Department determines that the offender falls into one of the categories described in [N.C. Gen. Stat. §] 14-208.40(a), the Department shall schedule a hearing in the court of the county in which the offender resides” and

5. We note, however, that an individual required to enroll in SBM pursuant to N.C. Gen. Stat. § 14-208.40(a)(2) is only subject to mandatory participation in the SBM program for a term of years rather than for life. N.C. Gen. Stat. § 14-208.40B(c); N.C. Gen. Stat. § 14-208.41(b). As a result, the trial court erred by ordering that Defendant enroll in lifetime SBM as compared to subjecting him to SBM for a term of years. However, given that we are reversing the trial court’s order and remanding this case to the trial court for a new SBM hearing for notice-related reasons, we need not afford any direct relief based upon this error given that it is not likely to recur as a result of the proceedings on remand.

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“notify the offender of the Department’s determination and the date of the scheduled hearing. . . .” 2007 N.C. Sess. L., c. 213, s. 3. In *State v. Stines*, — N.C. App. —, —, 683 S.E.2d 411, 418 (2009), this Court held that the Department’s notice obligation under N.C. Gen. Stat. § 14-208.40B(b) “mandates that the Department, in its notice, specify the category set out in N.C. Gen. Stat. § 14-208.40(a) into which the Department has determined the offender falls and briefly state the factual basis for that conclusion.” As a result, at the time that an SBM hearing is scheduled for an offender pursuant to N.C. Gen. Stat. § 14-208.40B, the version of N.C. Gen. Stat. § 14-208.40B(b) applicable to this proceeding required the Department to provide notice to the offender of the reason that the Department believed that he or she should be required to enroll in SBM and the basis for that determination.

The initial notice that the Department sent to Defendant on 8 January 2009 stated, among other things, that:

The Department of Correction has made the initial determination that you meet the criteria set out in General Statute 14-208.40(a), which requires your enrollment in Satellite Based Monitoring. Therefore, a Determination Hearing has been scheduled in Rowen [sic] County Superior Court on Friday, January 30, 2009 at 9:30 [a.m.]. The Court will review your case to make a determination concerning your eligibility for Satellite Based Monitoring. At this hearing, you will have the opportunity to contest evidence presented by the State that you are subject to the Satellite Based Monitoring program.

Although the notice sent to Defendant adequately informed him of the date, time, and location of his SBM hearing, it failed to “specify the category set out in N.C. Gen. Stat. § 14-208.40(a) into which the Department ha[d] determined” that Defendant fell or to “briefly state the factual basis for that conclusion.” *Stine*, — N.C. App. at —, 683 S.E.2d at 418. For that reason, we conclude that Defendant did not receive adequate notice of the Department’s preliminary determination in violation of N.C. Gen. Stat. § 14-208.40B(b) and that the trial court’s order should be reversed and this case remanded to the Rowan County Superior Court for a new SBM hearing, prior to which Defendant must be provided with adequate notice.

III. Conclusion

Thus, for the reasons set forth above, we conclude that Defendant did not receive adequate notice as required by N.C. Gen. Stat. § 14-208.40B(b) prior to his SBM hearing and that this deficiency in the proceedings leading to the trial court’s order necessitates an

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award of appellate relief. As a result, the trial court's order is reversed and this case is remanded to the Rowan County Superior Court for a new SBM hearing, prior to which adequate notice must be provided to Defendant.

REVERSED AND REMANDED.

Judge BRYANT concurs.

Judge ELMORE concurs in result only.

STATE OF NORTH CAROLINA v. SHADEEK ALI PITTMAN

No. COA09-1190

(Filed 21 September 2010)

Criminal Law— self-defense—instruction—prior threats insufficient

The trial court did not err in a first-degree murder case by denying defendant's request for an instruction on self-defense. Although the record established that the victim had threatened defendant repeatedly, the record was devoid of any evidence that the victim ever attempted to actually harm defendant. Prior threats, without more, were not sufficient to establish the existence of a reasonable need to use deadly force.

Appeal by defendant from judgment entered 29 January 2009 by Judge W. Russell Duke, Jr., in Pitt County Superior Court. Heard in the Court of Appeals 9 March 2010.

Attorney General Roy Cooper, by Buren R. Shields, III, Special Deputy Attorney General, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for defendant.

ERVIN, Judge.

Defendant Shadeek Pittman appeals from judgment entered by the trial court sentencing him to life imprisonment without parole in the custody of the North Carolina Department of Correction based on a jury verdict finding Defendant guilty of first-degree murder. After careful consideration of Defendant's challenge to the trial court's judgment in light of the record and the applicable law, we find that Defendant received a fair trial, free from prejudicial error, and that the trial court's judgment should remain undisturbed.

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I. Factual BackgroundA. State's Evidence

On 17 July 2007, Larry McLean, who had known Defendant for two or three years, rode his bicycle to a convenience store in Greenville, North Carolina. Mr. McLean had a number of criminal convictions and admitted having used marijuana. At the convenience store, Mr. McLean saw Defendant, who was also riding a bike. While Defendant and Mr. McLean talked in the parking lot, Kenneth DeWayne Andrews arrived and entered the store. When Mr. Andrews exited the store, he asked Defendant if he wanted to fight and said, "You still want to do that . . . we can go on the side or we can go ahead and do it now." Mr. Andrews accused Defendant of having stolen his wallet and pants, leading Defendant to point out that he had returned Mr. Andrews' pants. During the time they were at the convenience store, Defendant told Mr. McLean that Mr. Andrews had threatened Jessica Benson, the mother of Defendant's son, while they were at a park, a statement that Mr. Andrews did not dispute.

Although Mr. McLean urged Defendant and Mr. Andrews to end their feud, Defendant and Mr. Andrews continued to argue. Mr. McLean did not, however, see either Defendant or Mr. Andrews make a threatening gesture or display a weapon. However, Defendant did have a gun in his pocket on that occasion. According to Mr. McLean, Mr. Andrews was "fussing with [Defendant] about the pants and his wallet." When Defendant referred to a video he had made of Mr. Andrews' daughter, Mr. Andrews complained that the video "didn't come out right." Mr. McLean testified that Defendant and Mr. Andrews "kept going back and forth about the film, the wallet, [and the] pants." Finally, Mr. Andrews stated to Defendant that:

[W]hen you see me at [the] K&A [convenience store] you need to go to Kings [convenience store]. And if I'm at Kings you need to go to K&A, and if I'm walking down the street you need to cross over.

After Mr. Andrews made this pronouncement, Defendant rode off on his bike while Mr. McLean remained at the store talking to Mr. Andrews about ending his conflict with Defendant, until he "got [Andrews] calmed down[.]" At that point, Mr. Andrews walked towards his house and Mr. McLean rode away on his bicycle.

A few minutes later, Mr. McLean saw Defendant riding his bicycle. Shortly thereafter, Mr. McLean saw Mr. Andrews in front of his house. Mr. Andrews called Mr. McLean over and told Mr. McLean that

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he realized that it was time to end his conflict with Defendant. For that reason, Mr. Andrews asked Mr. McLean to tell Defendant that he was ready to stop quarreling about the stolen pants and wallet. During this conversation, Mr. Andrews was standing in his front yard while Mr. McLean straddled his bicycle in the street.

At that point, Defendant rode up on his bicycle and asked if Mr. Andrews and Mr. McLean were “still talking mess.” At the time that he came to Mr. McLean’s location, Defendant, who did not normally wear such an item of clothing, had a glove on his hand. According to Mr. McLean, Mr. Andrews attempted to tell Defendant “to let it go.” However, Defendant “pulled out a gun.” Although Mr. Andrews was “trying to talk,” Mr. McLean testified that Defendant would not “listen to what we had to say, and when he pulled the gun out, he fired it.” After Mr. McLean heard a shot, he saw Mr. Andrews grab his neck. Mr. McLean testified that Mr. Andrews did not approach Defendant, reach behind his back, or curse at Defendant before Defendant shot him. Instead, Mr. McLean stated that “we [were] trying to get [Defendant] not to do nothing he didn’t have no business because we seen him with the gun.” Mr. McLean left immediately, but he heard three more shots as he rode away. Later that day, Defendant called Mr. McLean, but hung up when Mr. McLean asked him, “Why did you do that?”

Elbert Biggs lived across the street from Mr. Andrews. On 17 July 2007, Mr. Biggs saw Defendant ride up on his bicycle and shoot Mr. Andrews while Mr. Biggs was on his own front porch. Mr. Biggs stated that, at the time that he initially appeared, Defendant was wearing gloves with cut-off fingers on his right hand and was holding a pistol on his handlebars with his finger on the trigger. After the first shot was fired, Mr. Andrews’ neck went around; after the second shot was fired, Mr. Andrews leaned over; at the time of the third shot, Mr. Andrews was running into his house. According to Mr. Biggs, Mr. Andrews was unarmed. Mr. Biggs admitted that he had glaucoma and cataracts, that his vision was blurred when he did not wear glasses, and that he was not wearing glasses that day.

Officer Paula Sauls of the Greenville Police Department testified that she was dispatched to 905 Imperial Street on 17 July 2007 in response to a report that a man had been shot at that location. At the time of her arrival, Officer Sauls saw blood leading into a house and found Mr. Andrews “collapsed [in a bedroom] in a very contorted position.” Officer R.W. Coltraine of the Greenville Police Department retrieved a number of Remington Peter 380 shell casings from the street in front

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of Mr. Andrews' residence. Detective Richard Williams of the Greenville Police Department, who served as the lead investigator into the shooting of Mr. Andrews, testified that Defendant claimed to have worn the glove in order to avoid getting gunshot residue on his hands. According to Special Agent Jessica Rosenberry of the State Bureau of Investigation, at least two of the five shell casings that Officer Coltraine found outside Mr. Andrews' residence were fired from the same weapon. No weapons were found near Mr. Andrews, in his pockets, or in his house.

Chiquita Barfield testified that she and Mr. Andrews were dating in July 2007. About a week before the shooting, Ms. Barfield and Mr. Andrews were at a Greenville bus stop, at which point Mr. Andrews saw Defendant. Defendant and Mr. Andrews "had words back and forth" about some pants and a wallet that had been stolen from Mr. Andrews. However, Defendant and Mr. Andrews stayed on opposite sides of the street. Mr. Andrews began arguing first on this occasion, and Ms. Barfield had to hold him back.

On 17 July 2007, Ms. Barfield was inside Mr. Andrews' house when she heard three gunshots. After Ms. Barfield heard the shots, Mr. Andrews came inside, bleeding from his chest and mouth. Ms. Barfield summoned an ambulance and stayed with Mr. Andrews until law enforcement officers and emergency medical care arrived. Mr. Andrews, who was wearing an electronic monitoring device, died as the result of multiple gunshot wounds. According to Dr. M.G.F. Gilliland, the shot to Mr. Andrews' face was not a fatal injury. Instead, the wound that resulted in Mr. Andrews' death entered the left side of the back, passed through the body, and exited on the right side of the chest.

B. Defendant's Evidence

Detective Richard Williams showed a photographic lineup that included Defendant's picture to Mr. Biggs, but Mr. Biggs was unable to identify anyone in the lineup. Detective Williams interviewed witnesses and viewed videotapes from the convenience store at which Defendant and Mr. Andrews had quarreled. On 19 July 2007, Detective Williams took Defendant into custody and interviewed him. Defendant introduced an audiotape of his statement to Detective Williams into evidence.

Defendant was twenty-six years old. Several years earlier, Defendant and another man had broken into a house and stolen various items, including Mr. Andrews' pants and wallet. Although he did not

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know Mr. Andrews at the time of the break-in, Defendant later learned that Mr. Andrews' pants were among the stolen items. When Mr. Andrews confronted Defendant about the stolen pants, Defendant returned them. According to Defendant, Mr. Andrews remained angry at Defendant after Defendant returned Mr. Andrews' pants. Defendant testified that, whenever the two men came into contact, Mr. Andrews displayed "a real bad attitude."

On Fathers' Day in 2007, Defendant visited Eppes Gym Park with his six year old son, Ms. Benson, and Ms. Benson's daughter.¹ Mr. Andrews was also present at the park with his young daughter. While the group was in the park, Mr. Andrews approached Defendant and asked him to make a video of Mr. Andrews and his child. At the time he made this request of Defendant, Mr. Andrews spoke "properly and very nicely." Although Defendant videotaped Mr. Andrews and his daughter for several minutes, Mr. Andrews was displeased with the result and told Defendant to make another tape, which Defendant agreed to do after he finished spending time with his son. Mr. Andrews replied that making a video was "the least [Defendant] could do" in exchange for Mr. Andrews' failure to beat Defendant up following Defendant's theft from Mr. Andrews. Mr. Andrews threatened to hurt Defendant, Ms. Benson, and their son. According to Defendant, Mr. Andrews cursed and was "disrespectful." However, Defendant conceded that he was not frightened by Mr. Andrews' threats because "he didn't touch me or put his hands on me or . . . get up in my face" and because Defendant was "threatened all the time." Defendant left the park because Mr. Andrews wanted to argue and "fuss and . . . fight" in front of their children. Similarly, Ms. Benson decided to leave the park after a brief argument with Mr. Andrews. As Defendant was leaving the park, he noticed the arrival of some other men with whom he had previously had an "altercation" stemming from Defendant's "association" with the Crips, a street gang. The new arrivals, who were associated with a rival gang, the Bloods, talked to Mr. Andrews and pointed at Defendant.

In July, 2007, Defendant had another encounter with Mr. Andrews. As Defendant was bicycling, he saw Mr. Andrews and a woman waiting at a bus stop. Defendant and Mr. Andrews "had some words;" during their conversation, Mr. Andrews said that one of them might "get hurt" because of their conflict.

1. Although Defendant and Ms. Benson had been romantically involved, their relationship had ended in 2005.

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On 17 July 2007, Defendant bicycled to a convenience store parking lot, where he planned to sell drugs. At that time, Defendant had an automatic pistol in his pocket. As Defendant, Mr. McLean, and another man named “Chill Will” were talking, Mr. Andrews arrived. Although Defendant started to leave in order to avoid having trouble with Mr. Andrews, Mr. McLean told Defendant to stay and offered to “put an end to” the dispute between Defendant and Mr. Andrews.

As Mr. Andrews emerged from the store, he approached Defendant and asked if Defendant wanted “to go around the store and fight one-on-one.” However, Mr. Andrews did not touch Defendant or suggest a gunfight. After Defendant declined Mr. Andrews’ invitation to engage in combat, Mr. McLean, Defendant, and Mr. Andrews discussed the incident in which Defendant stole items from a house in which Mr. Andrews was sleeping. During the conversation, Mr. Andrews continued to berate Defendant. As a result of his desire to avoid additional problems, Defendant left the store.

After changing clothes at home, Defendant rode his bicycle in the direction of the home of Ms. Benson’s new boyfriend in order to visit his son. As he bicycled, Defendant saw Mr. McLean, who said that Mr. Andrews had gone to Imperial Street. Defendant did not know that Mr. Andrews lived there. A few minutes later, Defendant saw Mr. McLean on Imperial Street talking with someone. Mr. McLean called to Defendant and asked Defendant to join him. As Defendant approached, he had his gun in his right pocket. When he neared Mr. McLean and the other individual, Defendant realized that Mr. McLean was talking to Mr. Andrews. At that point, Defendant and Mr. Andrews resumed their argument about “the pants and the wallet.”

According to Defendant, Mr. Andrews was standing in his yard while Defendant and Mr. McLean were in the street on their bicycles. Defendant was between Mr. McLean and Mr. Andrews at a distance of about two to three feet from both men. As Defendant turned towards Mr. McLean in order to talk with him, he noticed that Mr. McLean was looking over Defendant’s shoulder and backing away. “[O]ut of the corner of [his] eye,” Defendant saw that Mr. Andrews was “edging up” towards him and “reaching” behind him with his right hand. At trial, Defendant testified that:

A: . . . And, as he’s reaching . . . I pulled my gun out and it happened so fast I just—I mean start shooting to protect myself.

Q: . . . [W]hy did you feel like you had to shoot?

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A: I mean this—this guy’s always seeing me, threatening me. He’s been threaten[ing] my family. I mean at the time—I mean it just happened so quick that, I mean, I’m fearing for my life.

Q: What did you think Mr. Andrews was going to do?

A: I mean I—at the time and the way the situation was happening and looked—I mean I thought maybe he was going to hurt me.

Q: What did you think he was going to do?

A: Maybe try to jump on me, stab me. I mean whatever it took.

Defendant needed “a way to protect” himself because he feared Andrews might try to hurt him; “the only means of protection” available to Defendant at that time was a gun.

The incident was over in several seconds. Defendant claimed to have shot Mr. Andrews because Mr. Andrews was “easing” towards Defendant and reaching for something. Defendant acknowledged that he fired several shots at Mr. Andrews in rapid succession without attempting to ascertain where his shots landed. In addition, Defendant admitted that he did not know what Mr. Andrews was “reaching” for and had not seen a weapon in his possession.

Mr. Andrews was approximately the same size as Defendant. He had never touched Defendant or “followed through” on any threat throughout the course of their dispute. In addition, Defendant admitted that he had never seen a weapon in Mr. Andrews’ possession. Defendant never reported Mr. Andrews’ threats to the police. Similarly, Ms. Benson did not report Mr. Andrews’ behavior at the park to the police.

After Defendant shot Mr. Andrews, he went home. Defendant did not call the police because he was afraid. However, when Detective Williams arrested him, Defendant provided a statement concerning the shooting. In addition, although Defendant told Detective Williams where the gun used to kill Mr. Andrews was located, investigating officers were unable to locate it.

C. Procedural History

On 19 July 2007, a warrant for arrest was issued charging Defendant with the murder of Mr. Andrews. On 13 August 2007, the Pitt County grand jury returned a bill of indictment charging

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Defendant with the first-degree murder of Mr. Andrews. The case came on for trial before the trial court and a jury at the 26 January 2009 criminal session of the Pitt County Superior Court. Prior to trial, the trial court allowed the State's motion to amend the indictment returned against Defendant for the purpose of correcting the spelling of Mr. Andrews' middle name. At the close of both the State's evidence and all of the evidence, Defendant unsuccessfully moved to dismiss the charge against him. During the jury instruction conference, the trial court denied Defendant's request that the jury be instructed on the law of self-defense. After the arguments of counsel and the trial court's instructions to the jury, the jury returned a verdict convicting Defendant of the first-degree murder of Mr. Andrews. Based on the jury's verdict, the trial court sentenced Defendant to a term of life imprisonment without the possibility of parole in the custody of the North Carolina Department of Correction. Defendant noted an appeal to this Court from the trial court's judgment, contending that the trial court erred by failing to instruct the jury on the issue of whether he acted in self-defense.

II. Legal AnalysisA. Applicable Legal Principles

[B]efore the defendant is entitled to an instruction on self-defense, two questions must be answered in the affirmative: (1) Is there evidence that the defendant in fact formed a belief that it was necessary to kill his adversary in order to protect himself from death or great bodily harm, and (2) if so, was that belief reasonable? If both queries are answered in the affirmative, then an instruction on self-defense must be given. If, however, the evidence requires a negative response to either question, a self-defense instruction should not be given.

State v. Moore, 363 N.C. 793, 796, 688 S.E.2d 447, 449 (2010) (quoting *State v. Bush*, 307 N.C. 152, 160-61, 297 S.E.2d 563, 569 (1982)). In determining whether a defendant is entitled to a self-defense instruction, "the evidence is to be viewed in the light most favorable to the defendant" and, "if the defendant's evidence, taken as true, is sufficient to support an instruction for self-defense, it must be given even though the State's evidence is contradictory." *Id.* (citing *State v. Watkins*, 283 N.C. 504, 509, 196 S.E.2d 750, 754 (1973)). "The reasonableness of the belief must be judged by the facts and circumstances as they appear to the defendant, and it is a question for the jury to determine the reasonableness of

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defendant's belief." *State v. Davis*, 18 N.C. App. 436, 438-39, 197 S.E.2d 6, 8 (1973) (citing *State v. Robinson*, 213 N.C. 273, 195 S.E. 824 (1938)). However:

It is for the court to determine in the first instance as a matter of law whether there is any evidence upon which defendant reasonably believed it to be necessary to kill his adversary in order to protect himself from death or great bodily harm. If there is no evidence upon which the defendant in fact could form such a reasonable belief, then there is no evidence of self-defense and the issue should not be submitted to or considered by the jury.

State v. Stone, 104 N.C. App. 448, 452, 409 S.E.2d 719, 721 (1991) (citing *State v. Bush*, 307 N.C. 152, 297 S.E.2d 563 (1982); *State v. Johnson*, 166 N.C. 392, 81 S.E. 941 (1914); and *State v. Spaulding*, 298 N.C. 149, 257 S.E.2d 391 (1979), *rev. denied*, 330 N.C. 617, 412 S.E.2d 94 (1992)).

B. Necessity for Self-Defense Instruction

Defendant contends that, viewing the evidence in the light most favorable to Defendant, "a jury could have found that [Defendant's] fear of imminent danger of death or great bodily harm was reasonable in light of the totality of the circumstances," so that the trial court erred by refusing to instruct the jury on the issue of self-defense. According to Defendant, the trial court reached a contrary conclusion because it utilized "an after-the-fact view of the circumstances, rather than judging the issue on the basis [of] the circumstances that appeared to [Defendant] to exist when he had to make the split second decision of whether to respond with force to what looked like a lethal attack." We disagree.

The evidence,² taken in the light most favorable to Defendant, tends to show that Defendant and Mr. Andrews had a long-standing conflict that originated from an incident in which Defendant apparently stole a pair of pants and a wallet from Mr. Andrews in 2005.³ In attempting to establish the reasonableness of his fear of Mr. Andrews, Defendant points to the following evidence:

2. In analyzing the evidence, we consider only the facts and circumstances that were known to Defendant at the time of the shooting. Accordingly, we do not consider the evidence that Mr. Andrews told Mr. McLean that he wanted to end the feud or that no weapon was found near Mr. Andrews after he was shot in evaluating the merits of Defendant's argument on appeal.

3. Although Defendant admitted having stolen the pants and had returned them to Mr. Andrews, he denied having Mr. Andrews' wallet in his possession.

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The testimony of Defendant that, when he and Mr. Andrews saw each other, Mr. Andrews had a “bad attitude” and brought up the stolen pants and wallet.

The testimony of Mr. McLean and Defendant that Mr. Andrews had warned Defendant that, if Defendant saw Mr. Andrews on the street or shopping in a particular store, Defendant should cross the street or shop at a different establishment.

The testimony of Defendant and Ms. Benson that, on Fathers’ Day in 2007, Defendant and Mr. Andrews were at a park with their children. At that time, Mr. Andrews cursed at Defendant and Ms. Benson and threatened to hurt Defendant, Ms. Benson, and their son.

The testimony of Defendant that, when he bicycled past Mr. Andrews and his girlfriend about a week prior to the shooting, Mr. Andrews shouted at Defendant about the stolen wallet and pants and threatened to hurt Defendant.

The testimony of Defendant and Mr. McLean to the effect that, on the morning of 17 July 2007, Mr. Andrews asked Defendant if he wanted to “fight one-on-one,” complained about the stolen items, and reiterated his previous advice that Defendant avoid him by crossing the street or choosing a different convenience store at which to shop.

The testimony of Defendant that, later on 17 July 2007, Defendant stopped his bicycle at Mr. Andrews’ house to talk to Mr. McLean. As Defendant turned to talk to Mr. McLean, Mr. Andrews shouted at Defendant about the stolen items. Defendant saw Mr. McLean backing away and noticed “out of the corner of his eye” that Mr. Andrews was moving towards him while reaching behind his back for an unknown object.

According to Defendant, he thought Mr. Andrews might harm him with a weapon and was afraid for his life when he saw Defendant “easing” toward him and reaching behind his back. Assuming, for purposes of discussion, that Defendant actually believed that it was necessary to shoot Mr. Andrews in order to prevent Mr. Andrews from attacking him, the record evidence was insufficient to permit a reasonable jury to conclude that any such belief was a reasonable one.

In seeking to persuade us to reach a contrary result, Defendant contends that Mr. Andrews was “obsessive” about his grudge against

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Defendant and that, over the years, Mr. Andrews made “numerous threats” to Defendant. In fact, Mr. Andrews even threatened Ms. Benson and Defendant’s son. Defendant argues that, when Defendant saw Mr. Andrews moving towards him while reaching behind his back with his right hand, the two men were “in very close proximity” to each other and Defendant had “no time to make inquiry” about whether Mr. Andrews was “armed with a weapon.” On the basis of this logic, Defendant contends that his belief that he needed to use lethal force in order to prevent Mr. Andrews from attacking him was a reasonable one.

Although the record clearly establishes that Mr. Andrews had threatened Defendant repeatedly, the record is devoid of any evidence that Mr. Andrews ever threatened to kill Defendant or that Mr. Andrews ever attempted to actually harm Defendant. The record contains no evidence tending to show that anyone, including Defendant, had ever seen Mr. Andrews either in possession of a weapon or attack another person. The record lacked any indication that Mr. Andrews had a reputation for violence. Indeed, the uncontradicted evidence establishes that, while Mr. Andrews had been angry with Defendant for an extended period of time, their conflict had never escalated beyond idle threats and that Mr. Andrews had never touched Defendant or made any serious effort to hurt him. Finally, there was no evidence that Mr. Andrews threatened to hurt or attack Defendant during their 17 July 2007 argument or that the encounter between Defendant and Mr. Andrews on this occasion was more heated than earlier disputes. Instead, the undisputed evidence established that Defendant had a gun in his possession at the time that he approached Mr. McLean and Mr. Andrews; that he fired multiple shots at Mr. Andrews, the first of which was not fatal; and that he continued firing as Mr. Andrews attempted to retreat to his residence. As a result, the principal basis upon which Defendant seeks to persuade us that Defendant’s belief that he needed to kill Mr. Andrews in order to defend himself stems from the threats that Mr. Andrews had made against Defendant on prior occasions and Mr. Andrews’ conduct at the time of the shooting.

Prior threats, without more, do not suffice to establish the existence of a reasonable need to use deadly force. For example, in *State v. McCray*, 312 N.C. 519, 521, 324 S.E.2d 606, 609 (1985), the defendant and the deceased were prison inmates. According to the record evidence, the deceased had harassed and threatened the defendant.

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Id. at 524-25, 324 S.E.2d at 611. However, at the time that the defendant attacked the deceased, there was no evidence that the deceased posed any threat to the defendant. *Id.* at 531, 324 S.E.2d at 614. In holding that the deceased's prior threats did not, without more, support a reasonable belief that Defendant needed to use deadly force, the Supreme Court stated that:

Application of these principles to the facts . . . reveals that . . . there was no necessity—real or apparent—for the defendant to kill in order to protect himself from death or great bodily harm at the time in question. Defendant's evidence was to the effect that in the days preceding the fatal encounter a great deal of animosity and tension between the deceased and [defendant] was generated by the actions of the deceased in taunting and intimidating the defendant. . . . We are not persuaded by defendant's argument that [the deceased] should be considered the aggressor in the fatal affray by reason of his prior actions.

Id. at 530-31, 324 S.E.2d at 614. As a result, the fact that Mr. Andrews had threatened Defendant does not, under the circumstances revealed by the present record, demonstrate that the Defendant reasonably believed that it was necessary to kill Mr. Andrews in order to defend himself.

Defendant's description of Mr. Andrews' conduct immediately prior to the shooting does not, whether considered in isolation or in the context of Mr. Andrews' prior threats, suffice to support a self-defense instruction either. The fact that Mr. Andrews may have been "edging up" on Defendant while reaching behind his back with his right hand does not support a finding that Defendant reasonably believed that he needed to use lethal force in light of the fact that Defendant does not claim to have seen Mr. Andrews with a weapon on that or any occasion, that Mr. Andrews had not threatened him immediately prior to the shooting, or that Defendant had no other objective basis, aside from prior threats which had never involved or led to anything worse than an exchange of unpleasant words, for believing that Mr. Andrews was about to launch an attack on him that posed a risk that Defendant would suffer death or great bodily injury. As the Supreme Court stated in *State v. Williams*, 342 N.C. 869, 873-74, 467 S.E.2d 392, 394-95 (1996), in holding that a defendant's request for a self-defense instruction was properly denied:

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Defendant testified that he saw Staton reach for his belt as if reaching for a pistol. However, defendant also testified that he never actually saw Staton with a pistol. Other than the defendant's self-serving claim that he thought Staton was reaching for a weapon, the evidence shows only that Staton approached the scene and inquired, "What's up?" repetitively. The record is totally void of any evidence showing that Staton had a pistol or threatened defendant in any manner. There is no evidence that the victim ever had a weapon or made any threatening gesture toward the defendant.

Finally, the evidence shows that the defendant fired three shots. After the first shot was fired, the victim turned and began to run away. The victim was struck, in the back, by the third shot. The fact that the victim was shot in the back while attempting to run from the scene is significant. It is entirely unreasonable to believe that a person of ordinary firmness would have considered the use of deadly force necessary to protect himself or herself from an unarmed person who was running from the scene. . . . Even assuming that the defendant's fear was real, it did not justify a preemptive strike against an unarmed individual. Thus, the second element of perfect self-defense is not reflected in the evidence.

As a result, we conclude that there is no evidence that would support a finding that Defendant reasonably believed that he needed to use deadly force against Mr. Andrews to prevent death or serious bodily injury. Thus, the trial court did not err by declining Defendant's request that the jury be instructed on the law of self-defense.

NO ERROR.

Judges McGEE and GEER concur.

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STATE OF NORTH CAROLINA v. BRIAN ANTHONY REAVIS, DEFENDANT

No. COA09-1425

(Filed 21 September 2010)

1. Evidence— motion to suppress—constitutional grounds— first raised at trial

Defendant's constitutional objection at trial to admission of an interview with a detective, treated as a motion to suppress, was not timely made and the assignment of error was overruled. The legal grounds upon which defendant sought the exclusion of the evidence were constitutional, so that a pretrial motion to suppress was required, but defendant did not make such a motion and the exceptions that would allow the motion for the first time at trial did not apply.

2. Evidence— prior offenses—opened door

The trial court did not err by admitting evidence of defendant's prior offenses during cross-examination of defendant's psychiatrist where defendant opened the door on direct examination.

3. Burglary and Unlawful Breaking or Entering— sufficiency of evidence—nighttime

There was sufficient evidence that an offense occurred during nighttime to support a burglary conviction, aside from conflicting testimony from the victim, where there was also evidence from the 911 tape, the victim's statement to officers, the crime scene technician at the scene, and a record from the U.S. Naval Observatory to which defendant stipulated.

4. Burglary and Unlawful Breaking or Entering— no instruction defining nighttime—not plain error

There was no plain error in a burglary prosecution where the trial court did not instruct the jury on the definition of nighttime. Although there was some conflicting evidence, it could not be said that the jury probably would have reached a different verdict had the instruction been given.

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5. Constitutional Law— effective assistance of counsel— instruction not requested—different outcome improbable

There was no ineffective assistance of counsel in not requesting an instruction on the definition of nighttime in a burglary prosecution where it was highly improbable that there would have been a different result had the instruction been given.

Appeal by defendant from judgments entered on or about 8 May 2009 by Judge Phyllis M. Gorham in Superior Court, New Hanover County. Heard in the Court of Appeals 25 March 2010.

Attorney General Roy A. Cooper III, by Special Deputy Attorney General Jennie Wilhelm Hauser and Assistant Attorney General Phillip Reynolds, for the State.

Kathryn L. VandenBerg, for defendant-appellant.

STROUD, Judge.

Defendant was convicted of first degree sex offense, first degree burglary, malicious maiming, attempted first degree rape, and common law robbery. Defendant appeals on various grounds. For the following reasons, we find no error.

I. Background

The State's evidence showed that on 12 April 2008, Ms. Ann Smith¹ stepped outside to get her paper, and when she came back to her house "someone was helping [her] to step into [her] house. And [they] went inside fast. He locked the door and said that he only wanted [her] money, he would not hurt [her]." Ms. Smith gave defendant the money she had downstairs. Defendant took Ms. Smith upstairs, into the bedroom, where defendant "threw [her] across the bed" and began beating her and taking off her clothes. Defendant kept telling Ms. Smith that he just wanted money. Ms. Smith told defendant she was 95 years old and asked him to stop. Defendant "rubbed [his penis] all over" Ms. Smith. Defendant placed his fingers in Ms. Smith's vagina. Defendant eventually ran away. Ms. Smith suffered serious and permanent injuries during the attack, including a serious eye injury which required surgery to save her vision in one eye. Ms. Smith also has continuing pain in her neck and a decline in her hearing and balance since the attack.

1. A pseudonym will be used to protect the identity of the victim.

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On 30 April 2008, defendant made a statement at the Wilmington Police Department to Detective Paul Verzaal after defendant had been informed of and waived his Miranda rights. On or about 5 May 2008, defendant was indicted for first degree rape, first degree kidnapping, common law robbery, first degree sex offense, first degree burglary, malicious maiming, and three aggravating factors in the commission of the other offenses. On or about 18 November 2008 and 20 April 2009, defendant gave “notice of his intent to raise the defense of insanity and his intent to introduce expert testimony relating to a mental disease, defect, or other condition bearing upon the issue of whether he had the mental state required for the offense charged.” On or about 4 May 2009, the State dismissed the charge of first degree kidnapping. On or about 8 May 2009, defendant was convicted by a jury of attempted first degree rape, common law robbery, first degree sex offense, first degree burglary, and malicious maiming. Defendant had a prior felony record level of V. Defendant was sentenced to 433 to 529 months for his first degree sex offense conviction, 133 to 169 months for his first degree burglary conviction, 151 to 191 months for his malicious maiming conviction, and 282 to 348 months for his attempted first degree rape and common law robbery convictions; defendant’s sentences are to be served consecutively. Defendant was also ordered to “register as a sex offender” for life and “be enrolled in satellite-based monitoring” for life. Defendant appeals.

II. Defendant’s Interview

[1] Defendant first argues that the trial court should have suppressed evidence of his recorded interview by Detective Verzaal for several reasons. The record does not include a written motion to suppress the recorded interview prior to trial, but instead defendant’s attorney raised objections during trial. The following exchange took place regarding these objections to the interview:

MR. BROWN [defendant’s attorney]: Yes, your Honor. It’s my understanding the State is going to make a motion where they’re going to attempt to introduce Mr. Reavis’ in-custody interrogation. And I want to object to that. I would object to that on the basis that this is rebuttal evidence, based on Dr. Sloan’s testimony. Dr. Sloan said he saw an interview, but he did not specify what interview.

I believe the State is going to try to introduce a disk with the interview through Detective Verzaal, and that would be a violation of his Fifth Amendment right, self-incriminating, and I believe

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also the issues of whether or not he can fully understand the nature or appreciate any waivers that he may have acknowledged, and I think that it's highly prejudicial for the jury at this point to see that if he's not going to testify, which he's decided not to do.

And the State is probably going to argue that this is going to go to the formulation of Dr. Wolfe's opinion, but this was taken 18 days after the time of the crime.

(Emphasis added.) The trial court decided to allow evidence of the interview and defendant's attorney stated, "*And I object* under the Fourth, Fifth, and Sixth Amendments that it is not relevant as to whether or not he was sane at the time of the crime, and that our doctor did not acknowledge this piece of evidence that they wish to submit." (Emphasis added.)

When the State was ready to introduce defendant's interview during Detective Verzaal's testimony, defendant objected again and requested *voir dire*, which the trial court allowed, although defendant did not actually ask the witness any questions or present any evidence relevant to his objections. Defendant's attorney stated,

I argue to you that under the totality of the circumstances, Fourth, Fifth, Sixth Amendments, that Mr. Reavis was not able to fully be informed and fully understand the nature of waiving his Miranda rights. . . .

. . . .

I'm arguing to the Court that he wasn't capable of fully understanding, wasn't fully informed, and didn't fully—and have knowledge to waive his rights. And that's what's required for the admission of this evidence.

The trial court again overruled defendant's objection.

Defendant now argues that "the trial court erred in failing to make findings and conclusions on Mr. Reavis' motion to suppress his statement" and "in denying Mr. Reavis' motion to suppress his statement to police, as Reavis did not give a knowing, voluntary or intelligent waiver of his rights to silence and to counsel[.]" (Original in all caps.) However, defendant never actually made a "motion to suppress." In his brief, defendant refers to his objections as "[i]n-[t]rial [m]otion to [s]uppress [v]ideotaped [c]onfession[.]" the recorded interview, but the record does not support defendant's assertion that he made a motion to suppress.

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N.C. Gen. Stat. § 15A-974 provides that “Upon timely motion, evidence must be suppressed if: (1) Its exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina[.]” N.C. Gen. Stat. § 15A-974(a)(1) (2007). The legal grounds upon which defendant sought the exclusion of the recorded interview were constitutional, so a pretrial motion to suppress was required:

The exclusive method of challenging the admissibility of evidence upon the grounds specified in G.S. 15A-974 is a motion to suppress evidence which complies with the procedural requirements of G.S. § 15A-971 *et seq.* The burden is on the defendant to demonstrate that he has made his motion to suppress in compliance with the procedural requirements of G.S. § 15A-971 *et seq.*; failure to carry that burden waives the right to challenge evidence on constitutional grounds.

State v. Jones, 157 N.C. App. 110, 113, 577 S.E.2d 676, 678-79 (2003) (citations and quotation marks omitted).

N.C. Gen. Stat. § 15A-975 sets forth the requirements for a motion to suppress, which are applicable to defendant’s constitutional arguments that his recorded interview was inadmissible. N.C. Gen. Stat. § 15A-975 (2007). N.C. Gen. Stat. § 15A-975 provides that

(a) In superior court, the defendant may move to suppress evidence only prior to trial unless the defendant did not have reasonable opportunity to make the motion before trial or unless a motion to suppress is allowed during trial under subsection (b) or (c).

(b) A motion to suppress may be made for the first time during trial when the State has failed to notify the defendant’s counsel or, if he has none, the defendant, sooner than 20 working days before trial, of its intention to use the evidence

(c) If, after a pretrial determination and denial of the motion, the judge is satisfied, upon a showing by the defendant, that additional pertinent facts have been discovered by the defendant which he could not have discovered with reasonable diligence before the determination of the motion, he may permit the defendant to renew the motion before the trial or, if not possible because of the time of discovery of alleged new facts, during trial.

Id.

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Defendant makes no argument that the State failed to disclose the evidence of his interview or statement in a timely manner, and the trial court did not make any determination of a motion to suppress prior to trial; thus N.C. Gen. Stat. § 15A-975(b) and (c), which would permit a motion to suppress to be made for the first time during trial, are not applicable. *See* N.C. Gen. Stat. § 15A-975(b)-(c). Just as in *Jones*, “Defendant failed to bring himself within any of the exceptions to the general rule. . . . Thus, defendant’s objection at trial to the admissibility of the evidence is without merit because the objection, treated as a motion to suppress, was not timely made. We therefore overrule this assignment of error.” *Jones* at 114, 577 S.E.2d at 679 (citation omitted).

III. Prior Offenses

[2] Defendant next argues that the trial court erred by allowing evidence of his prior offenses. Defendant directs our attention to the testimony of Dr. Jerry Sloan who testified for defendant as an expert in the field of psychiatry. On direct examination by defense counsel, Dr. Sloan provided a thorough review of defendant’s history of mental illness, which included noting defendant’s time in prison in 1996 for robbery where defendant “was a difficult inmate.” During cross-examination, the State presented Dr. Sloan with police reports from three incidents, all occurring on the same day, which ultimately led to defendant’s conviction for the robbery for which defendant had previously been imprisoned. After summarizing the details of the police reports, the State went on to question Dr. Sloan about defendant at the time of the 1996 incidents, including his mental competency, whether defendant previously raised the issue of insanity, and defendant’s incentive to malingering during his time in prison.

Defendant argues that the trial court erred in admitting evidence regarding his prior offenses into evidence because the

evidence was not admissible; it was not proper rebuttal; the defendant expert did not rely on it in his report; the offenses were not similar and were remote in time to the instant offenses. The evidence was offered only to show propensity to commit crimes. The evidence was prejudicial, misleading and confused the issues for the jury[.]

“The standard of review for admission of evidence over objection is whether it was admissible as a matter of law, and if so, whether the trial court abused its discretion in admitting the evidence.” *State v. Boddien*, 190 N.C. App. 505, 512, 661 S.E.2d 23, 27 (2008) (citation

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omitted). “The trial court has wide discretion in controlling the scope of cross-examination and its rulings should not be disturbed unless prejudicial error is clearly demonstrated.” *State v. Wright*, 52 N.C. App. 166, 178, 278 S.E.2d 579, 588 (1981) (citations omitted).

Defendant makes at least six arguments for why the police reports and Dr. Sloan’s testimony regarding them are inadmissible, but even assuming *arguendo* that defendant properly preserved all these issues for appeal, he would still find no relief because he opened the door to this evidence. In *State v. Brown*, this Court provided a thorough analysis of when evidence that is typically not admissible becomes admissible on cross-examination or for rebuttal purposes because of the evidence presented by defendant:

When evidence which would have been excluded under one rule of admissibility is nevertheless made admissible and competent under a different and overriding rule, the rules ought first to be examined. When a defendant has neither taken the stand and testified nor independently placed his character in evidence through other witnesses, it is recognized to be prejudicial and reversible error to allow the State to introduce evidence of any prior convictions of the defendant. In that context we do not recognize it as either impeachment evidence or as being within the scope of cross-examination of other witnesses to allow knowledge of any prior criminal record to be heard. However, North Carolina has long recognized in trial practice a doctrine known as opening the door. Some text writers and other jurisdictions call it curative admissibility. In a note commenting upon the rules of curative admissibility, the author defines our phrase: Another is the familiar doctrine of opening the door; it is said that if one party without objection first introduces certain testimony the door is opened and he cannot later complain of the other party’s similar evidence. The author further comments that the reason the courts do admit rebutting evidence is because the emphasis is switched and is placed on the original party’s action in offering the evidence, by which he waived future objection to that class of evidence. The theory, as gleaned from *Kelley v. Hudson*, 407 S.W. 2d 553, 556 (Mo. 1966), is that the party who opens up an improper subject is held to be estopped to object to its further development or to have waived his right to do so. The Indiana Supreme Court said it this way: If a party opens the door for the admission of incompetent evidence, he is in no plight to complain that his adversary followed through the door thus opened. In Iowa, the court gave as its rationale

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for the doctrine: This was clearly a continuation of the subject introduced by the defendant, and objection cannot now be raised by the same party to the competency of the evidence. *Wigmore* . . . sums up the controlling principles for having a curative admissibility doctrine, by declaring, the emphasis is placed upon the original party's voluntary action in offering the evidence by which he virtually waived future objection to that class of facts.

State v. Brown, 64 N.C. App. 637, 644, 308 S.E.2d 346, 350-51 (1983) (citations, quotation marks, and brackets omitted), *aff'd*, 310 N.C. 563, 313 S.E.2d 585 (1984).

In *Brown*, the defendant questioned “[w]hether the trial court should have granted a mistrial on the grounds that testimony was allowed before the jury by defendant’s probation officer of defendant’s previous conviction when defendant had not taken the stand or put his character in issue[.]” *Brown* at 643, 308 S.E.2d at 350 (quotation marks omitted). This Court determined that defendant had “opened the door” to evidence of his prior offenses, noting that:

it was the defense counsel himself on direct examination of his own witness who elicited the testimony that the defendant was in fact on parole and that he had been on parole for two years. There was no motion by defense counsel to strike the answer as being unresponsive, or otherwise objectionable. Likewise, the defense counsel made no objection or motion to strike to the State’s going into this same subject matter when the district attorney asked, “Is he still under parole with you,” and received a “yes” answer. We hold that in this context the defense counsel opened the door to the facts surrounding the defendant’s parole, and the State could properly pursue a subject voluntarily introduced by the defense and which subject then fell within the scope of cross-examination once the door had been opened. As said in *Sisler v. Shaffer*, 43 W. Va. 769, 771, 28 S.E. 721, 721 (1897), Strange cattle having wandered through a gap made by himself, he cannot complain.

. . . In the case at bar, the defense counsel purposely called [the defendant’s parole officer] to establish the defendant’s residence. This witness testified freely concerning the defendant’s parole with no admonishment from defense counsel. Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially. . . .

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. . . [T]he defense counsel, in calling [the defendant's parole officer], invited the alleged error by eliciting evidence which he might have rightfully excluded if the same evidence had been offered by the State. It is important to note that the trial judge only admitted testimony concerning the conviction for which the defendant was on parole and no other evidence pertaining to his character or criminal record was allowed. Thus, the defendant was harmed only to the extent that he himself opened the door to the subject matter of his parole. Because the defendant opened the door to this particular conviction, this invited error could not be grounds for a mistrial.

Id. at 645-46, 308 S.E.2d at 351-52 (citations, quotation marks, ellipses, and brackets omitted).

Here, as in *Brown*, "it was the defense counsel himself on direct examination of his own witness who elicited the testimony that the defendant [had] in fact" been previously convicted of robbery. *Id.* at 645, 308 S.E.2d at 351. Defense counsel presented evidence as to defendant's time in prison, the year of the crime, the type of crime committed, defendant's time on probation, and defendant's probation violation which subsequently put him back in prison. On cross-examination, the State questioned Dr. Sloan about defendant's time in prison, defendant's previous "pleas which ultimately sent [defendant] to prison[,]" and the exact dates and times of the incidents, one of which led to defendant's incarceration, all without any objection from defendant. Defendant raised no objection until the State presented the police reports from defendant's prior robbery conviction. However, as Dr. Sloan had testified about the robbery conviction, the State could properly inquire into his knowledge of the events which led to the conviction. Just as in *Brown*, we conclude that defendant opened the door to questions regarding his crimes in 1996. *See id.* at 644-46, 308 S.E.2d at 350-52. Therefore, the trial court did not abuse its discretion in overruling defendant's objection. Accordingly, we overrule this argument.

IV. Burglary

As to defendant's conviction for burglary, defendant raises three issues, all dealing with the essential element of "nighttime." Defendant challenges the sufficiency of the evidence, the jury instructions, and the effectiveness of his counsel regarding this issue.

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A. Sufficiency of the Evidence

[3] Defendant argues that “there was insufficient evidence to convict Mr. Reavis of first-degree burglary, as [Ms. Smith] gave uncontroverted testimony that there was enough light to see a person next to her.” (Original in all caps.) At trial defendant made a motion to dismiss, arguing that the evidence was not sufficient to support a finding that the offense occurred during “nighttime,” which is an essential element of first degree burglary. *State v. Singletary*, 344 N.C. 95, 101, 472 S.E.2d 895, 899 (1996).

Evidence is sufficient to sustain a conviction when, viewed in the light most favorable to the State and giving the State every reasonable inference therefrom, there is substantial evidence to support a jury finding of each essential element of the offense charged, and of defendant’s being the perpetrator of such offense.

Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion. In considering a motion to dismiss, the trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witness’ credibility. Evidence is not substantial if it is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, and the motion to dismiss should be allowed even though the suspicion so aroused by the evidence is strong. This Court reviews the denial of a motion to dismiss for insufficient evidence *de novo*.

State v. Robledo, 193 N.C. App. 521, 524-25, 668 S.E.2d 91, 94 (2008) (citations, quotation marks, ellipses, and brackets omitted). “[C]ontradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve[.]” *State v. Prush*, 185 N.C. App. 472, 478, 648 S.E.2d 556, 560 (2007), *disc. review denied*, 362 N.C. 369, 663 S.E.2d 855 (2008).

“The elements of first-degree burglary are: (i) the breaking (ii) and entering (iii) in the nighttime (iv) into the dwelling house or sleeping apartment (v) of another (vi) which is actually occupied at the time of the offense (vii) with the intent to commit a felony therein.” *Singletary* at 101, 472 S.E.2d at 899 (citations omitted); *see* N.C. Gen. Stat. § 14-51 (2007). “North Carolina provides no statutory definition of nighttime. However, our courts adhere to the common

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law definition of nighttime as that time after sunset and before sunrise when it is so dark that a man's face cannot be identified except by artificial light or moonlight." *State v. McKeithan*, 140 N.C. App. 422, 432, 537 S.E.2d 526, 533 (2000) (citation and quotation marks omitted), *disc. review denied and appeal dismissed*, 353 N.C. 392, 547 S.E.2d 35 (2001).

During defendant's trial, Ms. Smith testified as follows:

A. That morning was not so dark that I couldn't see, you know, it was—it was—light was breaking. I could see quite well.

Q. Didn't, in fact, you say you were greeting the morning and you could see up and down the street?

A. Yes. And across.

Q. And across the street?

A. Yes.

Q. And in fact, you even looked through your peephole, and through your peephole you could see outside?

A. Pardon me?

Q. You looked through your peephole before you opened your door, right?

A. Oh, I do. I always do.

Q. And you didn't see anybody?

A. No one.

Q. And you had to walk across your steps to go down to your outside porch steps, right?

A. Yes.

Q. To get your newspaper. And you could see up and down the street, it was bright enough to see up and down the street?

A. Yes.

Q. And you could see across the street?

A. Yes.

Q. And if someone had been on the street, you would have been able to see them?

A. Yes.

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Q. Would you agree that if your neighbor had been standing next to you, you would have been able to see their face?

A. Oh, yes.

Q. Bright enough to be able to see their face if they had been next to you?

A. Yes, I could.

Ms. Smith's testimony tends to show Ms. Smith's home was not broken into in the nighttime. *McKeithan* at 432, 537 S.E.2d at 533.

However, there was also evidence that (1) Ms. Smith called 911 after her attack and the time of the 911 call was 5:42 a.m.; (2) Ms. Smith told police the time of her attack was between 5:00 and 5:30 a.m.; (3) the crime scene technician who arrived at the scene of the crime after the police were called testified "it was still pretty dark" when she arrived, and she used a flashlight in order to take good photographs; (4) defendant stipulated to a record from the U.S. Naval Observatory which showed that on the date of Ms. Smith's attack, the sun did not rise until 6:44 a.m., approximately an hour and fifteen minutes to an hour and forty-five minutes after other evidence established Ms. Smith was attacked; *see State v. Garrison*, 294 N.C. 270, 280, 240 S.E.2d 377, 383 (1978) (Our Supreme Court notes the time of sunset as found by the U.S. Naval Observatory to establish nighttime: "[W]e take judicial notice that in Union County on 1 March 1977 the sun set at 6:10 p.m. and that it was nighttime before 7:00 p.m. *See* the schedule for 'Sunrise and Sunset' computed by the Nautical Almanac Office, United States Naval Observatory."), this evidence tends to show that Ms. Smith's home was broken into in the nighttime. *See McKeithan* at 432, 537 S.E.2d at 533. Thus, the evidence is contradictory.

Viewing the evidence "in the light most favorable to the State and giving the State every reasonable inference therefrom," *Robledo* at 524, 668 S.E.2d at 94, there was sufficient evidence to take the case to the jury regarding defendant's charge for burglary. *See Singletary* at 101, 472 S.E.2d at 899; *Robledo* at 524, 668 S.E.2d at 94. "[C]ontradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve[.]" *Prush* at 478, 648 S.E.2d at 560. Accordingly, the trial court properly denied defendant's motion to dismiss. We overrule this argument.

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B. Jury Instructions

[4] Defendant next contends that “the trial court committed plain error in failing to instruct the jury on the definition of nighttime.” (Original in all caps). Defendant is correct in noting that “the trial judge must instruct the jury on the definition of nighttime, if there is doubt as to whether it was nighttime.” *McKeithan* at 432, 537 S.E.2d at 533 (citation and quotation marks omitted). As we have explained above, there was some “doubt as to whether it was nighttime” given the contradictory evidence. *Id.* However, defendant concedes he did not request an instruction on the definition of nighttime, and therefore he proceeds under plain error. “Under plain error review, the appellate court must be convinced that absent the error the jury probably would have reached a different verdict.” *State v. Doe*, 190 N.C. App. 723, 732, 661 S.E.2d 272, 278 (2008) (citation and quotation marks omitted).

We are not convinced that “the jury probably would have reached a different verdict” if the trial court had instructed the jury as to the definition of nighttime. *Id.* While the jury may have relied solely on the testimony of Ms. Smith, the jury might also have discounted the testimony of a 96-year-old woman in this respect and instead relied on the time of the 911 call, the time Ms. Smith originally said she was first attacked as reported to the police, the testimony of the crime scene technician who testified “it was still pretty dark” even after she arrived on the scene, and the record from the U.S. Naval Observatory establishing that sunrise was not until an hour and fifteen minutes to an hour and forty-five minutes after Ms. Smith was first attacked. Indeed, the undisputed evidence, the time of sunrise from the U.S. Naval Observatory as stipulated by defendant, is that the incident literally occurred “after sunset and before sunrise[.]” *McKeithan* at 432, 537 S.E.2d at 533. Considering Ms. Smith’s testimony that it was light enough for her to see defendant’s face as the only evidence supporting a finding that it was not nighttime, as opposed to the undisputed evidence as to the time of sunrise and other substantial evidence of darkness at that time of day, we cannot now find that “the jury probably would have reached a different verdict” had they been instructed on the definition of nighttime. *Id.* Accordingly, this argument is overruled.

C. Ineffective Assistance of Counsel

[5] Lastly, defendant argues his “trial counsel was ineffective in failing to request a jury instruction on the definition of nighttime.” (Original in all caps).

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To successfully assert an ineffective assistance of counsel claim, defendant must satisfy a two-prong test. First, he must show that counsel's performance fell below an objective standard of reasonableness. Second, once defendant satisfies the first prong, he must show that the error committed was so serious that a reasonable probability exists that the trial result would have been different absent the error.

However, the fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings. This determination must be based on the totality of the evidence before the finder of fact.

State v. Batchelor, — N.C. App. —, —, 690 S.E.2d 53, 57 (2010) (citations and brackets omitted).

As we have already determined, though defendant was entitled to an instruction on nighttime, he has failed to show that "but for counsel's error, there would have been a different result in the proceedings." *Id.* Defense counsel's stipulation to the time of sunrise indicates that he did not consider this issue to be seriously in dispute and the stipulation was entirely reasonable, as the trial court could have taken judicial notice of the time of sunrise, even without defendant's stipulation. *See Garrison* at 280, 240 S.E.2d at 383. Although on the evidence presented in this case, the jury could have reasonably decided either way regarding whether the crime was committed at nighttime, we consider it highly improbable that there would have been a different result if the jury had been instructed on the definition of nighttime. Accordingly, this argument is overruled.

V. Conclusion

For the foregoing reasons, we find no error.

NO ERROR.

Judges ELMORE and JACKSON concur.

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[207 N.C. App. 232 (2010)]

PROFILE INVESTMENTS NO. 25, LLC, PLAINTIFF v.
AMMONS EAST CORPORATION, DEFENDANT

No. COA09-1471

(Filed 21 September 2010)

1. Judges— one judge overruling another—no change of circumstances

An order granting defendant's third motion for summary judgment was vacated where there was no indication that the trial court made the change of circumstances determination necessary for one superior court judge to overrule another.

2. Contracts— breach—repudiation

The trial court erred by denying summary judgment for defendant on a repudiation of contract claim arising from a real estate transaction where plaintiff made clear that it intended to close in accordance with the contract and did not treat defendant Ammons' letter as a repudiation until Ammons tendered the deed.

Appeal by plaintiff from order entered 6 February 2008 by Judge Ripley E. Rand and 11 March 2009 by Judge Paul C. Ridgeway in Superior Court, Wake County and by defendant from order entered 6 February 2008 by Judge Ripley E. Rand and 21 July 2008 by Judge James C. Spencer, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 14 April 2010.

Parker Poe Adams & Bernstein LLP, by Charles E. Raynal, for Profile Investments No. 25, LLC.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P. by Scott A. Miskimon, J. Mitchell Armbruster, and Caroline N. Belk, for Ammons East Corporation.

STROUD, Judge.

The trial court granted summary judgment in favor of Ammons East Corporation pursuant to Ammons East Corporation's third motion for summary judgment. Both parties appeal various orders, and for the following reasons we (1) reverse the 6 February 2008 order of the trial court and remand for an entry of summary judgment in favor of Ammons East Corporation and (2) vacate the 11 March 2009 order of the trial court.

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I. Background

On or about 28 June 2007, plaintiff Profile Investments No. 25, LLC (“Profile”) filed a complaint against defendant Ammons East Corporation (“Ammons”). Profile sued for breach of contract by repudiation and requested specific performance and monetary damages. On or about 16 August 2007, Profile filed a motion for summary judgment. On 31 August 2007, Profile filed an amended complaint which stated essentially the same claim for breach of contract by repudiation as the original complaint, but the amended complaint did not seek specific performance. The amended complaint made the following allegations relevant to the breach of contract claim:

5. On or about June 13, 2005, Profile and Ammons East entered into that certain Real Estate Purchase And Sale Contract (the “Contract”), whereby Profile agreed to purchase and Ammons East agreed to sell certain real property located in Wake County, North Carolina (the “Property”).

....

11. Pursuant to the Contract, as amended, Profile had until July 31, 2007 to close the subject transaction.

12. On or about May 24, 2007, prior to the Contingency Satisfaction Date, Ammons East’s President, Justus M. (Jud) Ammons, sent a typed letter to Profile’s local real estate agent, insisting that Profile had to close on or before June 1, 2007 or else Ammons East would consider the Contract null and void. Mr. Ammons reiterated Ammons East’s position in a May 31, 2007 handwritten note at the bottom of his May 24, 2007 typed letter. . . .

13. Thereafter, in or about the first two weeks of June, 2007 in a telephone call with Profile’s local real estate agent, Mr. Ammons once again reiterated Ammons East’s position that the Contract was null and void and further stated that Ammons East would not sell the property to Profile unless Profile paid Ammons East a non-refundable deposit of approximately \$635,000, even though such a deposit was not required under the Contract.

14. Thereafter, in or about the first two weeks of June, 2007 in a telephone call with Profile’s member, Frank Csapo, Mr. Ammons once again reiterated Ammons East’s position that the Contract was null and void and further stated that Ammons East would not sell the property to Profile unless Profile paid Ammons

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East a non-refundable deposit of approximately \$320,000, even though such a deposit was not required under the Contract.

15. Mr. Csapo made clear in his telephone call with Mr. Ammons that Profile remained ready, willing, and able to close pursuant to the terms of the Contract.

16. Nonetheless, in or about the first two weeks of June, 2007, Ammons East entered into another real estate purchase and sale contract with regard to the Property with another party unrelated to Profile.

In the prayer for relief, Profile requested only an award of monetary damages.

On or about 2 November 2007, Ammons filed an answer to Profile's amended complaint, including counterclaims against Profile. On 27 November 2007, Ammons filed a motion for summary judgment. On or about 3 January 2008, Profile replied to Ammons's counterclaims. On 6 February 2008, the trial court denied both Profile's and Ammons's motions for summary judgment. On 21 May 2008, Ammons filed a second motion for summary judgment. On 21 July 2008, the trial court denied Ammons's second motion for summary judgment. On 26 November 2008, Ammons filed a third motion for summary judgment. On or about 11 March 2009, the trial court granted defendant's third motion for summary judgment and thus dismissed Profile's claim for breach of contract.

On 12 May 2009, Ammons voluntarily dismissed its counterclaims without prejudice. Both parties appeal.

II. Profile's Appeal

In its notice of appeal Profile appeals from the 6 February 2008 order of Judge Rand denying summary judgment as to both parties and the 11 March 2009 order of Judge Ridgeway granting summary judgment in favor of Ammons.

A. 11 March 2009 Order

[1] The 11 March 2009 order of Judge Ridgeway was based upon Ammons' third motion for summary judgment; both of Ammons's previous two summary judgment motions had been denied. Judge Ridgeway's order regarding Ammons's third motion for summary judgment raises a jurisdictional issue which this Court must address *sua sponte*. *Crook v. KRC Management Corp.*, — N.C. App. —, —, — S.E.2d —, —

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(Aug. 3, 2010) (No. COA09-936) (“If one trial judge enters an order that unlawfully overrules an order entered by another trial judge, such an order must be vacated, including any award of fines or costs. Since the issue in question relates to jurisdiction, and jurisdictional issues can be raised at any time, even for the first time on appeal and even by a court-*sua sponte*[.]” (citations and quotation marks omitted)).

One superior court judge may only modify, overrule, or change the order of another superior court judge where the original order was (1) interlocutory, (2) discretionary, and (3) there has been a substantial change of circumstances since the entry of the prior order. A substantial change in circumstances exists if since the entry of the prior order, there has been an intervention of new facts which bear upon the propriety of the previous order. The burden of showing the change in circumstances is on the party seeking a modification or reversal of an order previously entered by another judge.

Id. at —, — S.E.2d at — (citation and quotation marks omitted). Furthermore, “the determination of whether an adequate change in circumstances has occurred must be made by the trial court, not the parties.” *Id.* at —, — S.E.2d at — (citation omitted).

In *Crook*, the defendant appealed from a trial court order ruling on a motion to compel *after* a previous motion to compel had already been decided. *Id.* at —, — S.E.2d at —. This Court vacated and remanded the second order ruling on the motion to compel because

[t]he record simply contain[ed] no indication that the trial court made the required change of circumstances determination Secondly, in the absence of adequate findings specifying the nature of the change of circumstances upon which the court relie[d], it [wa]s without authority to overrule, either expressly or implicitly, the first judge’s prior determination as reflected in its order.

Id. at —, S.E.2d at — (citation, quotation marks, and brackets omitted).

Here, as in *Crook*, “[t]he record simply contains no indication that the trial court made the required change of circumstances determination[.]” *Id.* at —, — S.E.2d at — (quotation marks omitted). Accordingly, we vacate the 11 March 2009 order granting summary judgment in favor of Ammons. *See id.*, — N.C. App. —, — S.E.2d —. As we are vacating the 11 March 2009 order, we need not address plaintiff’s first two arguments on appeal.

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B. 6 February 2008 Order

[2] Profile also appeals from Judge Rand's 6 February 2008 order denying both Profile's and Ammons's summary judgment motions. Profile argues the trial court erred in its 6 February 2008 order because "Ammons is liable for breach of contract as a matter of law[.]" (Original in all caps.) Profile contends that the evidence establishes that "Ammons [r]epudiated the [a]greement[;]" "Profile [t]reated Ammons' [r]epudiation as a [b]reach[;]" and "Profile [w]as [r]eady, [w]illing and [a]ble . . . to [p]erform at the [t]ime of the [r]epudiation[.]"

In reviewing the trial court's decision to grant a motion for summary judgment,

the standard of review is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law. Summary judgment is appropriate when viewed in the light most favorable to the non-movant, the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.

S.B. Simmons Landscaping & Excavating, Inc. v. Boggs, 192 N.C. App. 155, 163-64, 665 S.E.2d 147, 152 (2008) (citations and quotation marks omitted).

The primary substantive issue presented by the pleadings in this case is whether Ammons breached its contract with Profile by repudiation.

Breach may . . . occur by repudiation. Repudiation is a positive statement by one party to the other party indicating that he will not or cannot substantially perform his contractual duties. When a party repudiates his obligations under the contract before the time for performance under the terms of the contract, the issue of anticipatory breach or breach by anticipatory repudiation arises. One effect of the anticipatory breach is to discharge the non-repudiating party from his remaining duties to render performance under the contract.

When a party to a contract gives notice that he will not honor the contract, the other party to the contract is no longer required to make a tender or otherwise to perform under the contract because of the anticipatory breach of the first party.

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Millis Constr. Co. v. Fairfield Sapphire Valley, 86 N.C. App. 506, 510, 358 S.E.2d 566, 569 (1987) (citations and brackets omitted).

For repudiation to result in a breach of contract, “the refusal to perform must be of the whole contract or of a covenant going to the whole consideration, and must be distinct, unequivocal, and absolute[.]” *Edwards v. Proctor*, 173 N.C. 41, 44, 91 S.E. 584, 585 (1917) (citation and quotation marks omitted). Furthermore, even a “distinct, unequivocal, and absolute” “refusal to perform” is not a breach “unless it is treated as such by the adverse party.” *Id.* (citation and quotation marks omitted). Upon repudiation, the non-repudiating party “may at once treat it as a breach of the entire contract and bring his action accordingly.” *Id.* (citation and quotation marks omitted). Thus, breach by repudiation depends not only upon the statements and actions of the allegedly repudiating party but also upon the response of the non-repudiating party. *See id.* (“When the promisee adopts the latter course, treating the contract as broken and himself as discharged from his obligations under it, he resolves his right into a mere cause of action for damages. His rights acquired under it may be dealt with in various ways for his benefit and advantage. Of all such advantages the repudiation of the contract by the other party, and the announcement that it will never be fulfilled, must of course deprive him. It is, therefore, quite right to hold that such an announcement amounts to a violation of the contract in omnibus, and that upon it the promisee, if so minded, may at once treat it as a breach of the entire contract and bring his action accordingly. In order to justify the adverse party in treating the renunciation as a breach, the refusal to perform must be of the whole contract or of a covenant going to the whole consideration, and must be distinct, unequivocal, and absolute, although the renunciation need not necessarily be made at the place of performance named in the contract. It may be observed, however, that the renunciation itself does not *ipso facto* constitute a breach. It is not a breach of the contract unless it is treated as such by the adverse party. Upon such a repudiation of an executory agreement by one party, the other may make his choice between the two courses open to him, but can neither confuse them nor take both.” (citation and quotation marks omitted)).

In *Edwards*, our Supreme Court examined the effect of an alleged statement of repudiation and the response of the non-repudiating party to the contract. *Id.*, 173 N.C. 41, 91 S.E. 584. The *Edwards* plaintiff sued the defendants, Proctor and Holliday, for breach of a contract under which plaintiff was employed to cut timber on the defendants’ land and operate a sawmill to cut the wood into lumber; the defendants

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also sued plaintiff to recover a balance due on the same contract. *Id.* at 42-43, 91 S.E. at 584. The two cases were consolidated and tried together. *Id.* at 42, 91 S.E.2d at 584.

Plaintiff Edwards alleged that Proctor and Holliday had committed a breach of contract, by ordering him to stop operations at the mill, which entitled him to sue at once for his damages. The evidence of plaintiff was that Holliday told him “to saw the logs he had already cut, and not to saw any more,” to which Edwards replied that he would not stop, or could not stop, until Mr. Proctor told him to do so, and that he would have to come down, and then both tell him to stop the cutting of timber. Holliday said he would send Proctor, and Proctor did go to the mill and told Edwards “that he wanted him to shut down,” to which Edwards replied “that he was not going to shut down until Proctor had paid him for the timber,” and Proctor said, “Well, go on and cut the timber.” When he walked off he remarked: “Shut down for a few days, and I will come back and let you know.” He did not come back and tell Edwards what to do. Proctor and Holliday did not state why they wanted Edwards to stop the mill, but did say that they had given an option on the land.

Id. at 43, 91 S.E. at 584. The jury determined that defendants Holliday and Proctor had not breached the contract and awarded nothing to plaintiff Edwards. *Id.* at 42, 91 S.E. at 584. Our Supreme Court determined there was no error in the trial because

[i]f we examine the proof in this case, no positive and absolute renunciation appears which gave the plaintiff a right to sue upon the contract for damages, as for a present breach of it. Holliday, it is true, had ordered the plaintiff Edwards to stop the mill after he had sawed the logs on hand or already cut. If the evidence had stopped here, the case might have been quite different from what we hold it is. But that is not all of it. *Edwards refused positively to obey the order, or to consider it as a renunciation of the contract and a breach thereof.* He insisted that the order must come from both of the parties, Holliday and Proctor, and that the former should send Proctor to see him, which was assented to and done. When Proctor came, he also told Edwards “to shut down,” but this Edwards declined to do until he was paid for what he had already done. Proctor then told him “to go on and cut the timber,” and then added, as he walked away: “Shut down for a few days, and I will come back and let you know.” This left the matter open

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for an agreement as to what should be done, a few days being allowed for reflection; but never afterwards was there any positive, unequivocal, or unqualified order to quit. If Edwards wanted the matter settled by a distinct understanding as to what he should do, "go on or stop," it was easy for him to have inquired of the defendants and got an answer about which there could be no doubt or uncertainty. Instead of pursuing this course, being, as suggested, "behind with the defendants," *he preferred to end the contract and sue for damages upon the theory that there had been a breach. He acted prematurely and inconsiderately in supposing that the time had arrived for him to proceed by suit to vindicate his supposed rights.*

Id. at 45, 91 S.E. at 585 (emphasis added).

We first note that there is no dispute as to the facts surrounding Ammons's alleged repudiation or Profile's response; the question is one of law as to whether the facts, viewed in the light most favorable to Profile, *see S.B. Simmons Landscaping & Excavating, Inc.* at 164, 665 S.E.2d at 152, support the claim of repudiation. Both parties admit that after execution of the original contract to purchase the property, they entered into three amendments to the original contract which extended the closing date, the last of which provided that the closing of the sale would occur on or by 31 July 2007. On or about 24 May 2007, Justus M. Ammons, president of Ammons, wrote a letter to Profile which provided in pertinent part:

As you are the agent for Profile Investments #25, LLC which has a contract on the above property with the first one dated 13 June 2005 and three subsequent amendments, last dated October 31, 2006, I want to notify you that the last calls for Closing on June 1, 2007. As you know I have called and talked with you on more than one occasion over the past several months.

I called Mr. Linderman to say that you had had plenty of time to Close. I have tried unsuccessfully to get a definite closing date, and I keep getting answers about yes you want to close, but no date has been set. I have been messing with you for more than two years.

I can't imagine anyone who cannot get their business straight in two years. Therefore, unless you make some other arrangements with me immediately I will consider this Contract null and void on June 1, 2007.

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On or about 31 May 2007, Mr. Ammons faxed the above letter to Profile with a handwritten note which read, “I will be out of town tomorrow[.] Back Mon[.] 4th—[w]hen I will definitely [c]onsider org[.] contract with you no longer exist.” Profile notes that Mr. Ammons demanded Profile “close the deal by June 1, 2007—60 days before the closing deadline.” Ammons contends that Mr. Ammons “misread . . . [the Third Amendment to the Agreement and] he honestly believed that Appellant’s deadline to close was June 1, 2007.”

On or about 12 June 2007, Ammons entered into another contract to sell the property at issue to Carolina CMC, LLC; however on or about 14 June 2007, two days later, Mr. Ammons wrote to Mr. Ross Copping with Carolina CMC, LLC stating in pertinent part,

This is to request that you provide written termination of our existing contract on the shopping center property in East Park dated June 12, 2007. As you know, I called you this morning to discuss with you the fact that the original contract I had for several years on this property I thought had expired and in good faith, told you it had expired and I was mistaken.

On or about 18 June 2007, Ms. Elizabeth Voltz, Profile’s attorney, sent a letter to Mr. Ammons which stated that “the Buyer is moving forward towards closing on or before July 31, 2007. The Buyer is ready, willing and able to proceed to Closing pursuant to the terms of the Contract.” Ms. Voltz’s letter then reiterated twice more with underlining that “the Buyer is ready, willing and able to close the transaction . . . on or before July 31, 2007.” (Emphasis in original.) Also on or about 18 June 2007, Ms. Voltz sent an email to Frank A. Csapo, Profile’s manager, informing him that

Jud [Ammons] was ‘confused by the dates in the contract’ and was going to immediately get in touch with the other buyer and let them know of the existence of your contract. Jim said that Jud was writing a letter to confirm that your contract was still in effect and that he would meet his obligations under your contract.

Ms. Voltz went on to state that “our main concern was that Jud [Ammons] did not sell the property to another buyer[.]”

On or about 28 June 2007, Profile filed suit against Ammons for breach of contract by repudiation, requesting specific performance and monetary damages. On or about 3 July 2007, Ammons and Carolina CMC, LLC terminated their agreement. On 5 July 2007, Ms. Voltz contacted Mr. Scott Miskimon, Ammons’s attorney, stating she

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was “glad to hear that Mr. Ammons has decided to proceed to closing” and to “[l]et [her] touch base with . . . [her] client and get back with you relative to a closing date.” Ms. Voltz then requested various seller documents. On 6 July 2007, Mr. Miskimon responded to Ms. Voltz and requested a specific closing date. On or about 31 July 2007, Ammons tendered the fully executed deed to the subject property to Ms. Voltz; however, Profile did not accept the deed. On 31 August 2007, Profile filed an amended complaint, which included the claim for breach of contract by repudiation, but this time dropping the request for specific performance and only requesting monetary damages.

We need not address whether Mr. Ammons’s letter setting closing on or by 1 June 2007 was a mistake or whether the content of Mr. Ammons’s letter, even with the erroneous date, could be considered as a repudiation, as the undisputed statements and actions of Profile make it clear that Profile did not treat the letter as a repudiation. Thus, even assuming *arguendo*, that Mr. Ammons’s letter was a “refusal to perform . . . the whole contract or of a covenant going to the whole consideration, and [was] . . . distinct, unequivocal, and absolute . . . [i]t is not a breach of the contract unless it is treated as such by the adverse party.” *Edwards* at 44, 91 S.E. at 585.

Here, after receipt of the letter “repudiating” the contract, Profile sent a letter to Mr. Ammons demanding that Ammons proceed with the contract or be sued. Within Profile’s letter, it emphasized on three separate occasions that it was “ready, willing and able to close . . . on or before July 31, 2007.” Profile even filed the original compliant seeking specific performance of the contract and continued to inform Ammons that it intended to close in accordance with the contract and requested seller documents from Ammons. Profile’s actions and statements clearly demonstrated that Profile was planning on proceeding with the contract and Profile did nothing to treat Mr. Ammons’s letter as a repudiation until Ammons tendered the deed. Only upon tender of the deed did Profile change its course, and after refusing to accept the deed it had demanded, dropped its claim for specific performance. As Profile did not treat Mr. Ammons’s letter as a repudiation, the contract was never breached. *See Edwards*, 173 N.C. 41, 91 S.E. 584. Accordingly, we reverse the 6 February 2008 order of the trial court denying summary judgment in favor of Ammons.

III. Defendant’s Appeal

Ammons concedes in its brief “[i]f Appellant Profile’s appeal is unsuccessful, the Court may dismiss this cross-appeal as moot.” Therefore, we need not address defendant’s appeal.

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IV. Conclusion

For the foregoing reasons we reverse the 6 February 2008 order of the trial court and remand for entry of an order granting summary judgment in favor of Ammons and vacate the 11 March 2009 order of the trial court.

REVERSED and REMANDED in part; VACATED in part.

Judges McGEE and HUNTER, JR., Robert N., concur.

J. MICHAEL WEEKS, EXECUTOR OF THE ESTATE OF DONALD H. GRUBB, DECEASED, PLAINTIFF-APPELLEE v. JAMES R. JACKSON; FALLS VALLEY I, LLC; AND FALLS VALLEY II, LLC, DEFENDANTS-APPELLANTS

No. COA09-1460

(Filed 21 September 2010)

Evidence— Dead Man’s Statute—no waiver of protection

The trial court did not err in a wills case by excluding an affidavit submitted by defendant Jackson and thereafter granting the executor’s partial summary judgment motion. The executor did not waive the applicability of N.C.G.S. § 8C-1, Rule 601(c) because he did not seek to elicit evidence of oral communications between the decedent and the opposing parties.

Appeal by Defendants from order and judgment entered 18 May 2009 by Judge W. Osmond Smith, III in Superior Court, Wake County. Heard in the Court of Appeals 14 April 2010.

Kirk, Kirk, Howell, Cutler & Thomas, L.L.P., by C. Terrell Thomas, Jr., for Plaintiff-Appellee.

Williams Mullen, by Camden R. Webb and Elizabeth C. Stone, for Defendants-Appellants.

McGEE, Judge.

J. Michael Weeks (Executor), executor of the estate of Donald H. Grubb (Decedent), filed a complaint on 17 July 2007, seeking to collect on a promissory note (the Note). Executor alleged in his complaint that James R. Jackson (Jackson), Falls Valley I, LLC (Falls I), and Falls Valley II, LLC (Falls II) were indebted to Executor in the amount of \$30,000.00 plus interest. Jackson, Falls I, and Falls II filed an

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answer and counterclaim on 17 September 2007, denying the alleged indebtedness and asserting a counterclaim of common law obstruction of justice.

Executor served Jackson and Falls I with requests for admissions and interrogatories, to which Jackson and Falls I replied in documents dated 19 March 2008. Executor filed a motion for partial summary judgment against Jackson and Falls I on 3 March 2009. In response to Executor's motion, Jackson filed an affidavit on behalf of himself and Falls I. Jackson's affidavit included a discussion of oral communications between Jackson and Decedent.

At a 20 April 2009 hearing on Executor's partial summary judgment motion, Jackson and Falls I (hereinafter Defendants) tendered supplemental responses to Executor's discovery requests. The supplemental responses again included information regarding oral communications between Jackson and Decedent. At the hearing, Executor moved to strike Jackson's affidavit. Executor also objected to Defendants' supplemental responses and made an oral motion to strike the responses. The trial court granted both of Executor's motions to strike. At this hearing, Falls II voluntarily dismissed its counterclaim.

In an order and judgment entered 18 May 2009, the trial court concluded that Jackson's affidavit and the supplemental responses "contain details of oral communications which are prohibited by Rule 601." The trial court further concluded there was no genuine issue of material fact and that the Executor was entitled to judgment as a matter of law, and entered summary judgment in favor of Executor. Executor voluntarily dismissed the claims against Falls II on 18 May 2009. Defendants appeal.

Based on the pleadings and discovery responses, the record shows that Defendants received a check in the amount of \$30,000.00 from Decedent and deposited the check into the operational account of Falls I in August 2004. Defendants executed the Note on 4 August 2004 that stated: "Princip[al] and Interest due in one payment on or before January 28, 2005." The Note was payable to "Donald H. Grubb, heirs and or assigns" and was signed by Jackson, as "manager."

Defendants deny any obligation under the Note and assert that the Note was executed subject to a condition precedent. Arguing the defense of conditional delivery in their answer, Defendants filed Jackson's affidavit to show the existence of the condition precedent. Jackson's affidavit, containing an explanation of the circumstances

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surrounding the original loan and the execution of the Note, stated that Decedent was Jackson's father-in-law and frequently consulted with Jackson concerning "business enterprises." Jackson had borrowed money from Decedent on prior occasions and had always repaid such loans. Decedent was "a consultant" on two of Jackson's building projects. One of the buildings "required upfit for one tenant with additional lease space to be secured by leases to other tenants." Jackson asked Decedent for \$30,000.00 to complete "the upfit, with repayment based upon securing the additional tenants by January 2005." Because Jackson was unsure if Decedent would lend him the money, he "filled out a promissory note form" with a due date of 28 January 2005 and signed the Note. Jackson then mailed the Note to Decedent.

Jackson's affidavit further stated that Jackson later spoke with Decedent about the Note, and Decedent "agreed to be repaid if the upfit was undertaken upon the securing of the tenants by January, 2005." Decedent initially declined to lend Jackson the money, but then agreed to make the loan on 19 August 2004. According to Jackson's affidavit, he was unable to secure tenants for the real property, and he was therefore not obligated to repay the loan. Jackson further asserted that he "was never provided a copy of the [N]ote" and that he did not believe the Note was effective. Finally, Jackson's affidavit contained a paragraph in which Jackson recounted a conversation that occurred between Jackson and Decedent "about 18 months after the [N]ote was due" and shortly before Decedent's death. Jackson asserted that "[i]n that conversation, [Decedent] told [him] that[,] because the leasing was not completed by the due date, he did not need to be repaid and that nothing further needed to be done." Defendants' supplemental discovery responses that Defendants attempted to submit at the partial summary judgment hearing contained substantially the same information as Jackson's affidavit.

I. N.C. Gen. Stat. § 8C-1, Rule 601(c)

[1] Defendants argue that the trial court erred by excluding Jackson's affidavit and thereafter granting Executor's partial summary judgment motion. Specifically, Defendants argue that Executor waived the applicability of N.C.G.S. § 8C-1, Rule 601(c), commonly referred to as the Dead Man's Statute, by inquiring into protected matters through the discovery process.¹ Executor denies waiver.

1. The rule set forth in Rule 601(c) was formerly codified as N.C. Gen. Stat. § 8-51, which was repealed in 1984. *See Almond v. Rhyne*, 108 N.C. App. 605, 609, 424 S.E.2d 231, 233 (1993). Rule 601(c) disqualifies only evidence of "oral communications," where

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Under N.C. Gen. Stat. § 8C-1, Rule 601(c)(2009), the testimony of interested parties under certain circumstances may be disqualified. Relevant here, Rule 601 provides that “a party . . . shall not be examined as a witness in his own behalf or interest . . . against the executor . . . of a deceased person . . . concerning any oral communication between the witness and the deceased person[.]” N.C.G.S. § 8C-1, Rule 601(c). Our Court recently stated that “[t]he purpose of this rule is to exclude evidence of statements made by deceased persons, ‘since those persons are not available to respond.’” *Estate of Redden v. Redden*, 194 N.C. App. 806, 808, 670 S.E.2d 586, 588 (2009) (citations omitted).

Defendants do not challenge the applicability of Rule 601(c); rather, Defendants contend that the trial court erred by failing to find that Executor waived the protections of Rule 601(c) by “serving written discovery addressing the transaction at issue.”

Our Courts have long held that a party may waive the protections of Rule 601(c) by inquiring into oral communications between the opposing party and the decedent. In *Wilkie v. Wilkie*, 58 N.C. App. 624, 294 S.E.2d 230 (1982), our Court discussed waiver of protections of the Dead Man’s Statute, in a complaint filed by a decedent’s second wife against the children of the decedent’s first marriage. In *Wilkie*, the children filed and served interrogatories on the second wife, and the trial court made the following findings regarding the questions asked therein:

[T]he questions propounded related, at least, in part to “personal transactions” with the deceased . . . and related specifically to [the] subject matter of this lawsuit. That plaintiff answered the interrogatories, and the answers contained statements by the plaintiff, which in part, are “personal transactions” with the decedent. . . . That there was no objection by the plaintiff to the interrogatories or any one of them; and that there was no objection by the defendants to the answer of any of the interrogatories.

Id. at 626, 294 S.E.2d at 231.

N.C.G.S. § 8-51 excluded evidence of “oral communications or transactions.” *Compare* N.C.G.S. § 8C-1, Rule 601(c) *with* former N.C.G.S. § 8-51. However, pertinent to this opinion, the commentary to Rule 601(c) states that “[i]t was not the intent of the drafters of subdivision (c) to change any existing cases where the Dead Man’s Statute has been held to be inapplicable, or where, because of the actions of one party or the other the protection of the rule has been held to be waived.” N.C.G.S. § 8C-1, Rule 601, North Carolina Commentary; *see also Breedlove v. Aerotrim, U.S.A., Inc.*, 142 N.C. App. 447, 452-53, 543 S.E.2d 213, 217 (2001).

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Our Court held that “the defendants succeeded in eliciting incompetent evidence under G.S. 8-51 after they served interrogatories upon plaintiff and filed the answers . . . [Therefore, the] defendants waived the protection afforded by G.S. 8-51.” *Id.* at 627, 294 S.E.2d at 231. In so holding, our Court noted that it was immaterial that the defendants had not actually introduced the responses to the interrogatories into evidence at trial; rather, “‘waiver of an exception to incompetent evidence under G.S. 8-51 occurs when the objecting party *first succeeds* in eliciting the incompetent evidence.’” *Id.* (citations omitted, emphasis in the original).

In *Redden*, our Court addressed the issue of waiver where the party asserting Rule 601(c) had “asked no questions soliciting evidence of oral communications between the decedent and defendant.” *Redden*, 194 N.C. App. at 808, 670 S.E.2d at 588. In *Redden*, the “[e]state deposed defendant and offered the deposition testimony into evidence at the partial summary judgment hearing[.]” *Id.* We noted, however, that the “[e]state asked no questions soliciting evidence of oral communications between the decedent and defendant. In addition, answers by defendant relating to such oral communications were promptly objected to by [the] [e]state, with appropriate motions to strike.” *Id.* Our Court concluded that the testimony should have been excluded because “[t]he incompetent testimony was not elicited by the [e]state for its own benefit, but offered by defendant, of her own volition, against the [e]state. These are precisely the types of statements the Dead Man’s Statute seeks to disqualify as incompetent.” *Id.* at 809, 670 S.E.2d at 588.

In our Court’s recent opinion *In re Will of Baitschora*, — N.C. App. —, — S.E.2d — (NO. COA09-1141, filed 21 September 2010), we noted two instances where waiver would occur:

The mandates of Rule 601(c) and our prior case law on the issue of whether an interested party has “opened the door” and waived the protection of the Dead Man’s Statute, has led to the rule that: if the question propounded by counsel to his own witness or an adverse witness specifically requires the witness to repeat oral communications with the deceased, then there has been a waiver under Rule 601(c)(1) or (3) by the party propounding the question. If, on the other hand, the question propounded by counsel to his own witness does not specifically require the witness to repeat oral communications with the deceased, and the answer given by his own witness provides an oral communication with the

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deceased, then there has also been a waiver under Rule] 601(c)(1) or (3) by the answering party.

Baitschora, — N.C. App. at —, — S.E.2d at —. Thus, if counsel directly solicits testimony otherwise privileged from either party, the privilege has been waived; likewise, if counsel does not directly solicit the information from his or her own witness, but that witness volunteers the information, the answering party waives the privilege. We find that a corollary not directly stated in *Baitschora* necessarily arises from these rules and applicable case law as discussed above: if counsel does not directly solicit privileged information, and the opposing party volunteers the information, waiver will not be imputed to the party conducting the inquiry. Thus, in the present case, we must begin our analysis of waiver by determining whether Executor asked “questions soliciting evidence of oral communications between” Decedent and Defendants. *Redden*, 194 N.C. App. at 808, 670 S.E.2d at 588; *see also Breedlove v. Aerotrim, U.S.A., Inc.*, 142 N.C. App. 447, 543 S.E.2d 213 (2001) (finding waiver where the defendant, seeking to exclude testimony concerning a conversation between a deceased employee and the plaintiff, had previously deposed the plaintiff concerning the conversation); *and Lee v. Keck*, 68 N.C. App. 320, 323, 315 S.E.2d 323, 326 (1984) (finding waiver where the “defendants had, during the course of discovery, served interrogatories on each plaintiff asking what promises or statements [the decedent] made to them”).

In the case before us, Executor served requests for admissions on Defendants simultaneously with interrogatories. The requests for admissions served on Jackson contained the following:

1. Admit that you received \$30,000.00 from [Decedent] in 2004, on or prior to August 4, 2004.
...
2. Admit that Exhibit A is a true and accurate copy of the Promissory Note you executed in favor of [Decedent].
...
3. Admit the genuineness of the Promissory Note attached hereto as Exhibit A.
...
4. Admit that you signed the Promissory Note (a copy of which is attached hereto as Exhibit A) in your individual capacity.

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...

5. Admit that you signed the Promissory Note (a copy of which is attached hereto as Exhibit A) on behalf of Falls Valley I, LLC.

...

6. Admit that you signed the Promissory Note (a copy of which is attached hereto as Exhibit A) on behalf of Falls Valley II, LLC.

...

7. Admit that you signed the Promissory Note (a copy of which is attached hereto as Exhibit A) on behalf of a limited liability company.

8. Admit that you signed the Promissory Note (a copy of which is attached hereto as Exhibit A) on two different lines.

The requests for admissions served on Falls I sought similar admissions. Among the interrogatories submitted, Executor included the following interrogatory, labeled as interrogatory three: "If [Defendants] denied in whole or part any of the Requests for Admissions served simultaneously herewith, please state the complete factual basis for making each denial and identify all documents that support each denial."

Defendants submitted answers to the requests for admissions and to the interrogatories on 19 March 2008. In part, Defendants responded to the requests for admissions by admitting the genuineness of the Note itself, but denying that Decedent "loan[ed] money pursuant to the terms of the Note." Defendants' answer to interrogatory three was: "See Responses to Requests for Admission." At the 20 April 2009 hearing on Executor's motion for partial summary judgment, Defendants tendered "supplemental discovery responses" along with Jackson's affidavit. In their supplemental response, Defendants modified their answer to interrogatory three, to include a lengthy explanation of the terms of the loan and details of oral communications between Jackson and Decedent. Executor moved to strike Jackson's affidavit and Defendants' supplemental discovery responses, and the trial court granted Executor's motions to strike.

As quoted above, Executor's requests for admissions specifically targeted the "genuineness" of the Note and the signatures thereon. Executor did not request an admission that the loan was made pursuant to the terms of the Note. Further, in interrogatory three,

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Executor asked for the complete factual basis for any denial of any request for admission. When read in conjunction with the requests for admission, this interrogatory seeks the factual basis for any denial as to the genuineness of the Note itself or the signatures thereon. We do not find that interrogatory three seeks to elicit evidence of oral communications between Decedent and Defendants, in part, because such evidence would be irrelevant to the fact of whether the Note or the signatures thereon were genuine.

We find these circumstances virtually indistinguishable from those in *Redden*. In the present case, as in *Redden*, Executor “asked no questions soliciting evidence of oral communications between the decedent and defendant.” *Redden*, 194 N.C. App. at 808, 670 S.E.2d at 588. Further, when Defendants attempted to submit Jackson’s affidavit and their supplemental discovery responses, Executor objected and moved to strike. Comparing Executor’s discovery motions with the inquiries made in *Redden*, *Breedlove*, *Lee*, and *Wilkie*, we do not find that Executor was seeking to elicit evidence of oral communications between Jackson and Decedent. The fact that Defendants attempted to file supplemental discovery responses containing evidence of the oral communications is irrelevant in light of our determination that Executor did not solicit such evidence. We do not impute a waiver of Rule 601(c) to Executor simply because Defendants attempted to file answers to questions not asked by Executor. Because Executor did not seek to elicit evidence of the oral communications and, therefore, did not waive the protection afforded by Rule 601(c), the trial court properly granted Executor’s motions to strike Jackson’s affidavit and Defendants’ supplemental discovery responses.

Defendants’ remaining argument concerns whether the trial court erred in granting Executor’s partial summary judgment motion. However, Defendants’ sole argument as to partial summary judgment is premised on a finding of waiver of Rule 601(c) on the part of Executor. In light of our holding affirming the trial court’s ruling on Executor’s motion to strike, this argument is without merit.

Affirmed.

Judges STROUD and HUNTER, JR. concur.

CAROLINA MARINA & YACHT CLUB, LLC v. NEW HANOVER CNTY. BD. OF COMM'RS

[207 N.C. App. 250 (2010)]

CAROLINA MARINA AND YACHT CLUB, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY, PETITIONER V. NEW HANOVER COUNTY BOARD OF COMMISSIONERS AND NEW HANOVER COUNTY, RESPONDENTS, AND VIOLET WARD, INTERVENOR-RESPONDENT

No. COA10-77

(Filed 21 September 2010)

Appeal and Error— mootness—appeal dismissed

Respondent intervenor's appeal from the superior court's order reversing the New Hanover County Board of Commissioners' order, which denied the application of Carolina Marina and Yacht Club, LLC for a special use permit, was dismissed as moot. Respondent intervenor's purpose in bringing her appeal was plainly to prevent the special use permit from being issued to Carolina Marina and that relief could no longer be granted.

Appeal by intervenor-respondent from order entered 6 August 2009 by Judge Gary L. Locklear in New Hanover County Superior Court. Heard in the Court of Appeals 30 August 2010.

Shanklin & Nichols, LLP, by Kenneth A. Shanklin and Matthew A. Nichols, for petitioner-appellee Carolina Marina and Yacht Club, LLC.

Kurt B. Fryar, for intervenor-respondent-appellant Violet Ward.

Martin, Chief Judge.

Violet Ward appeals from the superior court's 6 August 2009 order reversing the New Hanover County Board of Commissioners' 7 July 2008 order, which denied the application of Carolina Marina and Yacht Club, LLC for a special use permit. For the reasons stated herein, we dismiss this appeal as moot.

Carolina Marina and Yacht Club, LLC ("Carolina Marina"), a North Carolina limited liability company, is the record owner of the real property at 1512 Burnett Road, which is located in an R-15 residential zoning district in Wilmington, North Carolina. On 7 May 2008, Carolina Marina submitted a special use permit application to the New Hanover County Planning Department ("the Planning Department") concerning the property at 1512 Burnett Road. At the time Carolina Marina submitted its permit application, the Burnett Road property was already operating as a commercial marina in accordance with Special

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Use Permit No. 13 (“the S-13 permit”), which had been issued on 7 June 1971 to a family member of the parties from whom the Burnett Road property was later conveyed to Carolina Marina.

The current S-13 permit for the Burnett Road property allows for two piers, a boat ramp, a 3-story clubhouse, surface parking for 41 boats, and associated parking for the combined uses. Carolina Marina’s May 2008 application to the Planning Department requested a permit allowing, among other things, the construction of a dry stack storage structure approximately 40 feet high, 115 feet wide, and 290 feet long, which would be capable of storing up to 200 boats, and the elimination of an existing marina boat ramp to accommodate the construction of a fortified forklift pier, which would be capable of use by a marine forklift that would carry and deliver boats between the dry stack storage structure and the water at the end of the pier.

On 5 June 2008, the Planning Department voted 4-0 to recommend the denial of Carolina Marina’s permit application. On 7 July 2008, Carolina Marina’s permit application was considered by the New Hanover County Board of Commissioners (“the Board”) at a public hearing. After considering all of the evidence presented, the Board voted unanimously to deny Carolina Marina’s request for a special use permit, which was identified by the Board as proposed special use permit S-582.

On 22 August 2008, Carolina Marina sought review of the Board’s decision to deny its request by petition for writ of certiorari in the New Hanover County Superior Court, which the court allowed. On 30 June 2009, Violet Ward, who owned property in the immediate vicinity of the property that was the subject of Carolina Marina’s special use permit proposal, moved to intervene in the action as a respondent.¹ After conducting a hearing on the matter, on 6 August 2009, the superior court entered an order in which it (1) reversed the Board’s decision denying Carolina Marina’s application for proposed special use permit S-582, (2) granted Violet Ward’s motion to intervene, and (3) remanded the matter to the Board with instructions that it should enter an order granting Carolina Marina’s application for proposed special use permit S-582.

On 8 September 2009, only Violet Ward filed notice of appeal from the superior court’s 6 August 2009 order; neither the Board nor New

1. Ms. Ward’s son, David, sought to intervene in the action by the same motion. Because the superior court subsequently determined that David Ward merely resided on neighboring property and did not own said property, the superior court denied the motion to intervene as to David Ward.

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Hanover County appealed from the superior court's order. On the same day, Violet Ward filed an Application for Stay in the superior court, in which she requested that the court stay its 6 August 2009 order until the resolution of her appeal by this Court. On 30 October 2009, Violet Ward filed a Motion for Injunction Pending Appeal in the superior court, in which she prayed the superior court to enter an injunction against the Board from issuing Carolina Marina's permit in accordance with the 6 August 2009 order. On 16 November 2009, the superior court denied Violet Ward's Application for Stay and Motion for Injunction Pending Appeal. On 23 November 2009, Violet Ward filed a Petition for Writ of Supersedeas and Temporary Stay and Temporary Injunction in this Court (P09-930). This Court denied Violet Ward's petition for writ of supersedeas on 7 December 2009.

On 16 December 2009, the Board entered an order granting Carolina Marina's application for special use permit S-582 "[b]ased upon [the Board's] hearing and the decision rendered on July 7, 2008 and the Order of Superior Court Judge Gary Locklear dated August 6, 2009" On 19 April 2010, Carolina Marina filed its Notice of Mootness and Motion to Dismiss Appeal as Moot.

Whenever, during the course of litigation, "it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law." *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978), *cert. denied sub nom. Peoples v. Jud'l Standards Comm'n of N.C.*, 442 U.S. 929, 61 L. Ed. 2d 297 (1979). "Unlike the question of jurisdiction, the issue of mootness is not determined solely by examining facts in existence at the commencement of the action." *Id.* at 148, 250 S.E.2d at 912. "If the issues before a court or administrative body become moot *at any time during the course of the proceedings*, the usual response should be to dismiss the action." *Id.* (emphasis added).

Here, Carolina Marina moved to dismiss Violet Ward's appeal on the grounds that the Board's 16 December 2009 order, which issued the special use permit S-582 sought by Carolina Marina, rendered moot the issues raised by Violet Ward's appeal. In so doing, Carolina Marina relies upon this Court's opinion in *Estates, Inc. v. Town of Chapel Hill*, 130 N.C. App. 664, 504 S.E.2d 296 (1998), *disc. reviews denied*, 350 N.C. 93, 527 S.E.2d 664-65 (1999). *In Estates, Inc. v. Town*

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of *Chapel Hill*, the respondent's town council denied an application for a special use permit requested by the petitioners. *See Estates*, 130 N.C. App. at 665, 504 S.E.2d at 298. The petitioners sought review of this decision by certiorari in the superior court pursuant to N.C.G.S. § 160A-381, and the owners of property in the immediate vicinity of the petitioners' proposed development moved to intervene, which the superior court allowed. *See id.* After considering the matter, "the superior court reversed the Council's denial of petitioners' application for a special use permit and directed the Council to approve the application and issue the permit." *Id.* The intervenors appealed to this Court from the superior court's order. *See id.*

Four days later, during a time when the superior court's order was automatically stayed pursuant to N.C.G.S. § 1A-1, Rule 62, "in compliance with the mandate of the superior court, the Town Council issued the special use permit sought by petitioners." *Id.* at 665, 667-68, 504 S.E.2d at 298, 299. The petitioners then sought to dismiss the intervenors' appeal to this Court on the grounds that the questions raised by the appeal had become moot as a result of the subsequent issuance of the permit by the respondent's town council. *See id.* at 665-66, 504 S.E.2d at 298. This Court agreed and found that "[a] reversal of the superior court's ruling by this Court would have the limited effect of affirming the Council's initial denial of petitioners' request for a special use permit. It would do nothing to invalidate the permit *later issued voluntarily by the Council pursuant to the superior court's mandate.*" *Id.* at 668, 504 S.E.2d at 300 (emphasis added). Further, since "[o]ur review of th[e] case [wa]s limited to determining whether the Town Council's quasi-judicial decision to deny the permit in the first place was lawful," *id.*, this Court recognized that "the question of whether the permit issued by the Town Council is valid was never ruled on by any court and therefore [wa]s not before us." *Id.* at 668-69, 504 S.E.2d at 300. Thus, because "[i]ntervenors' purpose in bringing their appeal was, plainly, to prevent the special use permit from being issued to petitioners[, and t]hat relief [could] no longer be granted in th[e] case[, this Court concluded that t]he issues raised in intervenor[s'] appeal [we]re therefore moot." *Id.* at 669, 504 S.E.2d at 300.

In the present case, Violet Ward presents the following issues for review: (I) whether the superior court applied the correct standard of review when it considered the Board's decision to deny Carolina Marina's application for proposed special use permit S-582; (II) whether the superior court correctly determined that there was

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competent, material, and substantial evidence that Carolina Marina met each of the requirements set forth in the New Hanover County Zoning Ordinance § 71-1(3); and (III) whether the superior court erred as a matter of law when it concluded that Carolina Marina satisfied the requirements set forth in the New Hanover County Zoning Ordinance § 71-1(3) and ordered the Board to grant Carolina Marina's application for proposed special use permit S-582. In other words, as in *Estates*, the arguments presented to this Court for review by Violet Ward are "limited to determining whether [the Board's] quasi-judicial decision to deny the permit in the first place was lawful," and do not address whether the permit later issued by the Board on 16 December 2009 is valid. *See id.* at 668, 504 S.E.2d at 300.

But Violet Ward asserts that *Estates* is distinguishable from the present case because, in *Estates*, the respondent's town council "voluntarily" issued the permit during a time when the superior court's order was automatically stayed pursuant to N.C.G.S. § 1A-1, Rule 62, *see id.* at 667-68, 504 S.E.2d at 299, while, in the present case, the superior court issued the permit about three months after the expiration of the automatic stay at a time when the Board would, according to Violet Ward, "face other legal action to compel compliance, possibly Contempt," had it not issued the permit. There is no evidence before this Court that enforcement proceedings had been initiated against the Board when it issued Carolina Marina's special use permit S-582. Nevertheless, Violet Ward argues, without authority, that the Board could not have "voluntarily" issued a permit consistent with the superior court's order after the automatic stay had expired. We are not persuaded by Violet Ward's unsupported assertion.

Here, as in *Estates*, the special use permit was issued during a time when enforcement proceedings had not been initiated for the superior court's order. Thus, the record before this Court indicates that the Board's quasi-judicial body issued a special use permit "voluntarily . . . pursuant to the superior court's mandate." *See id.* at 668, 504 S.E.2d at 300. Further, as was the case in *Estates*, the validity of the permit issued by the Board on 16 December 2009 has not been ruled on to date by any court, and the issues presented by Violet Ward to this Court are limited to determining whether the Board's decision to deny Carolina Marina's request for a special use permit was lawful in the first place. *See id.* Therefore, since Violet Ward's purpose in bringing her appeal in the present case was, like *Estates*, "plainly, to prevent the special use permit from being issued to [Carolina Marina, and t]hat relief can no longer be granted in this case," *see id.*, we

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conclude the issues presented for review by Violet Ward's appeal have become moot. Accordingly, we grant Carolina Marina's motion to dismiss Violet Ward's appeal.

Dismissed.

Judges STROUD and ERVIN concur.

STATE OF NORTH CAROLINA v. DENNIS O'KIETH BLACKWELL, DEFENDANT

No. COA09-1476

(Filed 21 September 2010)

Evidence— erroneous admission of laboratory reports—failure to serve notice of intent to use reports

Defendant was entitled to a new trial in a possession with intent to sell cocaine and selling cocaine case based on the trial court's erroneous admission of two laboratory reports. Defendant was not served with notice of the State's intent to use the laboratory reports as evidence of the identity, nature, and quantity of any and all controlled substances or alleged controlled substances seized as required by N.C.G.S. § 90-95(g). Prior to 15 June 2009, the State should have served any notices to defendant personally. Introduction of the first laboratory report was error and the introduction of the second laboratory report was plain error.

Appeal by defendant from judgment entered on or about 17 June 2009 by Judge Donald W. Stephens in Superior Court, Person County. Heard in the Court of Appeals 28 April 2010.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Tawanda Foster-Williams, for the State.

Russell J. Hollers III, for defendant-appellant.

STROUD, Judge.

Defendant was convicted of two counts of possession with intent to sell cocaine and two counts of selling cocaine. As defendant was not served with notice of the State's intent to use laboratory reports "as evidence of the identity, nature and quantity of any and all controlled substances or alleged controlled substances seized[,] we grant defendant a new trial.

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I. Background

On or about 9 February 2009, defendant was indicted for two counts of possession with intent to sell and deliver cocaine and two counts of selling cocaine in 2008. Defendant was also indicted for obtaining habitual felon status. On or about 9 March 2009, defendant waived his “right to assigned counsel[.]” and the record does not contain any indication that defendant was represented by privately retained counsel until June 2009. On or about 19 March 2009, the State provided attorney Chris Perkins with notice pursuant to N.C. Gen. Stat. § 90-95(g) and (g1) that it intended to “use any all Laboratory Reports and Chain of Custody Reports or Records prepared by and with the State Bureau of Investigation . . . as evidence of the identity, nature and quantity of any and all controlled substances or alleged controlled substances seized or otherwise relevant[.]” The certificate of service of the notice indicates that it was served upon Mr. Perkins as counsel for defendant. On or about 15 June 2009, defendant filed a *pro se* request for discovery. Also on or about 15 June 2009, Mr. Perkins was appointed as defendant’s counsel. However, on 16 June 2009, attorney C.A. Couch filed a “NOTICE OF APPEARANCE” on behalf of defendant. On or about 17 June 2009, the day after Mr. Couch began representing defendant and two days after Mr. Perkins was appointed as defendant’s counsel, defendant was tried by a jury and found guilty on all four drug-related charges. Mr. Couch represented defendant at trial. After the verdicts were rendered, defendant pled guilty to obtaining habitual felon status. Defendant appeals.

II. Attorney of Record

Within defendant’s broader arguments as to why the State should not have been allowed to introduce two laboratory reports which identified the substances which he was charged with possessing and selling as cocaine, defendant noted that “on March 19th, the [S]tate served Mr[.] Perkins with notices of its intent to use SBI laboratory reports regarding the identity and nature of any seized substances.” From the record before us, Mr. Perkins was not defendant’s attorney in March of 2009; defendant had waived his right to assigned counsel and did not have a court-appointed or retained attorney until 15 June 2009. At trial, defendant was represented by Mr. Couch. The State counters defendant’s argument that he was representing himself prior to 15 June 2009 by stating that defendant’s “argument is not persuasive, given that the record is clear that up until June 16, 2009, when Mr. Couch appeared, Mr. Perkins was the attorney of record for Defendant.” The State then

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refers to two documents in the record and two transcript references which it argues show that “the record is clear that . . . Chris Perkins was the attorney of record for Defendant.” The State relies upon the following references as to defendant’s counsel:

- (1) a March 2009 notice the State sent to Chris Perkins regarding introducing defendant’s statement¹;
- (2) the trial court’s appointment of Chris Perkins as defendant’s counsel on 15 June 2009;
- (3) the trial court’s statement to counsel that “I met in chambers this morning with Mr. Perkins and Mr. Brasher who has been, who Mr. Perkins I appointed yesterday[;]” and
- (4) the trial court’s inquiry to defendant immediately before his trial if he would like his appointed counsel, Mr. Perkins or his retained counsel, Mr. Couch, to represent him at trial.

None of these references establish that defendant had any legal representation before 15 June 2009. To the contrary, the references tend to show that defendant was representing himself until 15 June 2009. Therefore, prior to 15 June 2009, the State should have served any notices to defendant upon him personally. *See* N.C. Gen. Stat. § 90-95(g) (2007).

During the trial, defendant objected to admission of the first laboratory report into evidence, but not the second. When a defendant objects to the admission of evidence, we consider, “whether [the evidence] was admissible as a matter of law, and if so, whether the trial court abused its discretion in admitting the evidence.” *State v. Bodden*, — N.C. App. —, —, 661 S.E.2d 23, 27 (2008) (citation omitted), *disc. review denied and appeal dismissed*, 363 N.C. 131, 675 S.E.2d 660, *cert. denied*, — U.S. —, 175 L. Ed. 2d 111 (2009). When a defendant fails to object to the admission of evidence we review for plain error. *See State v. Wilson*, — N.C. App. —, —, 691 S.E.2d 734, 738 (2010) (“Where, as here, a criminal defendant fails to object to the admission of certain evidence, the plain error analysis . . . is the applicable standard of review.” (citation and quotation marks omitted)). However, in this instance, we need not distinguish between these two standards of review as to the two separate laboratory reports, because the

1. “The State sent two notices to Mr. Perkins on or about 19 March 2009, one regarding defendant’s statement and one regarding laboratory reports. The State only cites to the notice of defendant’s statement as evidence that Mr. Perkins was defendant’s attorney before 15 June 2009.

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introduction of each laboratory report resulted in prejudice so grave that it meets the heightened standards of plain error review. *State v. Leyva*, 181 N.C. App. 491, 499, 640 S.E.2d 394, 399 (“Plain error is error so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.” (citations and quotation marks omitted)), *disc. review denied and appeal dismissed*, 361 N.C. 573, 651 S.E.2d 370 (2007), *disc. review dismissed*, — N.C. —, 673 S.E.2d 872 (2009).

N.C. Gen. Stat. § 90-95(g) provides that

[w]henever matter is submitted to the North Carolina State Bureau of Investigation Laboratory, the Charlotte, North Carolina, Police Department Laboratory or to the Toxicology Laboratory, Reynolds Health Center, Winston-Salem for chemical analysis to determine if the matter is or contains a controlled substance, the report of that analysis certified to upon a form approved by the Attorney General by the person performing the analysis shall be admissible without further authentication in all proceedings in the district court and superior court divisions of the General Court of Justice as evidence of the identity, nature, and quantity of the matter analyzed. Provided, however, that a report is admissible in a criminal proceeding in the superior court division or in an adjudicatory hearing in juvenile court in the district court division only if:

- (1) The State notifies the defendant at least 15 days before trial of its intention to introduce the report into evidence under this subsection and provides a copy of the report to the defendant, and
- (2) The defendant fails to notify the State at least five days before trial that the defendant objects to the introduction of the report into evidence.

Nothing in this subsection precludes the right of any party to call any witness or to introduce any evidence supporting or contradicting the evidence contained in the report.

N.C. Gen. Stat. § 90-95(g).

During trial, when defendant’s attorney objected to the introduction of the first laboratory report, the State’s attorney said that the State was “allowed to get in the results and the laboratory report through

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the officer since there was no objection made regarding this matter five days prior to trial.” The trial court determined that the State had “satisfied the requirements of 90-95 Subsection G[,]” referring to notification to the defendant “15 days before trial of its intention to introduce the report into evidence[,]” *id.*, and overruled defendant’s objection. Thus, the trial court overruled defendant’s objection, in part, because the State had complied with N.C. Gen. Stat. § 90-95(g). However, as we have already determined, the State had not complied with this provision as the State failed to serve defendant himself with notice of its intent to introduce the laboratory reports.

The trial court erroneously concluded that the State had complied with N.C. Gen. Stat. § 90-95(g) and overruled defendant’s objection to the first report; this resulted in admission of the first laboratory report which showed the substance defendant possessed and sold was cocaine. Although defendant failed to object to the second laboratory report, the extent of prejudice to defendant from the second report is no different from the first. Defendant was convicted of two counts of possession with intent to sell and deliver cocaine and two counts of selling cocaine; the first report addressed the substance possessed and sold as to two charges, and the second report addressed the substance possessed and sold as to two other charges. For each charge, the identification of the substance as cocaine was a fundamental part of the State’s case. *See generally State v. Ward*, — N.C. —, —, 694 S.E.2d 738, 747 (2010) (“[T]he burden is on the State to establish the identity of any alleged controlled substance that is the basis of the prosecution. Unless the State establishes before the trial court that another method of identification is sufficient to establish the identity of the controlled substance beyond a reasonable doubt, some form of scientifically valid *chemical analysis* is required.” (emphasis added)). Without the erroneous admission of the laboratory reports, there was no competent evidence that the substance which defendant possessed and sold was cocaine, *see id.*, and a jury could not have found defendant guilty, even if the trial proceeded that far, since without the laboratory reports, the case against defendant would have been subject to dismissal at the close of the State’s evidence. Accordingly, we conclude that introduction of the first laboratory report was error, introduction of the second laboratory report was plain error, and defendant is entitled to a new trial. As we are granting defendant a new trial, we need not review his other issues on appeal.

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III. Conclusion

As we have determined that admission of the laboratory reports into evidence was error or plain error, we reverse the judgment and remand for a new trial.

NEW TRIAL.

Judges McGEE and HUNTER, JR., Robert N., concur.

STATE OF NORTH CAROLINA v. ROBERT LLOYD MAY, DEFENDANT

No. COA10-140

(Filed 21 September 2010)

1. Satellite-Based Monitoring— clerical error

The Court of Appeals treated defendant's brief as a petition for *writ of certiorari* and determined that the trial court did not err by requiring him to enroll in a satellite-based monitoring program for the duration of his natural life upon his release from incarceration. The case was remanded for the limited purpose of correcting a clerical error on Form AOC-CR-615 by marking Box 1(b) and unmarking Box 1(a).

2. Appeal and Error— preservation of issues—failure to argue

The Court of Appeals declined to address defendant's remaining issues that he conceded had already been resolved by the Court of Appeals. Defendant failed to advance any further arguments.

Appeal by defendant from order entered 25 August 2009 by Judge James E. Hardin, Jr. in Alamance County Superior Court. Heard in the Court of Appeals 30 August 2010.

Roy Cooper, Attorney General, by Oliver G. Wheeler, IV, Assistant Attorney General, for the State.

Jon W. Myers, for defendant-appellant.

MARTIN, Chief Judge.

Defendant Robert Lloyd May appeals from the trial court's order requiring him to enroll in a satellite-based monitoring ("SBM") program for the duration of his natural life.

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On 25 August 2009, defendant was convicted upon a guilty plea of taking indecent liberties with a child in violation of N.C.G.S. § 14-202.1. The trial court found that defendant had twelve prior record level points and determined he was a level IV violator. The trial court sentenced defendant to a minimum of 25 months and a maximum of 30 months imprisonment. In a subsequent hearing later that day, the trial court determined that defendant's offense was a reportable conviction under N.C.G.S. § 14-208.6. The trial court first instructed the clerk to mark Box 1(a) on the Administrative Office of the Courts' Form AOC-CR-615, indicating that the reportable conviction was an offense against a minor. The trial court then corrected itself and instructed that Box 1(b) should be marked instead, indicating that the reportable conviction was a sexually violent offense. However, the court's correction during the rendition of its order was not reflected on the form. The trial court also determined that defendant qualified as a recidivist under N.C.G.S. § 14-208.6(2b). Accordingly, the trial court ordered defendant to enroll in a lifetime SBM program at the end of his incarceration. Defendant purported to appeal from this order by giving oral notice of appeal in open court.

[1] Rule 3 of the North Carolina Rules of Appellate Procedure sets forth the requirements to appeal in a civil action, and provides that parties wishing to appeal “may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subdivision (c) of this rule.” N.C.R. App. P. 3(a) (amended Oct. 1, 2009). While Appellate Rule 4 provides, in part, that a defendant in a criminal proceeding “may take appeal by . . . giving oral notice of appeal at trial,” *see* N.C.R. App. P. 4(a)(1) (amended Oct. 1, 2009), “oral notice of appeal is insufficient to confer jurisdiction on this Court in a civil action.” *Melvin v. St. Louis*, 132 N.C. App. 42, 43, 510 S.E.2d 177, 177, *cert. denied*, 350 N.C. 309, 534 S.E.2d 594 (1999).

This Court has previously determined that satellite-based monitoring is a civil remedy, not a criminal punishment. *See State v. Singleton*, — N.C. App. —, —, 689 S.E.2d 562, 565, *disc. review allowed*, 364 N.C. 131, — S.E.2d — (2010); *State v. Bare*, — N.C. App. —, —, 677 S.E.2d 518, 527 (2009). Therefore, when a defendant seeks to appeal from an order requiring him to enroll in an SBM program, this Court has held that “oral notice pursuant to N.C.R. App. P. 4(a)(1) is insufficient to confer jurisdiction on this Court. Instead, a defendant must give notice of appeal pursuant to N.C.R. App. P. 3(a) as is proper ‘in a civil action or special proceeding[.]’” *State v. Brooks*, — N.C.

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App. —, —, 693 S.E.2d 204, 206 (2010) (alteration in original) (quoting N.C.R. App. P. 3(a)).

In the present case, an examination of the record shows that defendant purported to give oral notice of appeal in open court from the trial court's 25 August 2009 order, rather than written notice of appeal in accordance with the requirements of Rule 3. Since defendant failed to give timely written notice of appeal from the court's 25 August 2009 order, and since "[t]he provisions of Rule 3 are jurisdictional, and failure to follow the requirements thereof requires dismissal of an appeal," see *Abels v. Renfro Corp.*, 126 N.C. App. 800, 802, 486 S.E.2d 735, 737, *disc. review denied*, 347 N.C. 263, 493 S.E.2d 450 (1997), we must dismiss defendant's appeal.

Although defendant has lost his right to appeal from the court's order requiring him to enroll in a lifetime SBM program, this Court may, in its discretion, issue a writ of certiorari "when the right to prosecute an appeal has been lost by failure to take timely action." N.C.R. App. P. 21(a)(1) (amended Oct. 1, 2009). Accordingly, we treat defendant's brief as a petition for writ of certiorari and allow it for the purpose of considering his contentions upon their merits.

Defendant first contends the trial court erred by indicating that defendant was convicted of the reportable conviction of "an offense against a minor" on the Administrative Office of the Courts' Form AOC-CR-615, entitled "Judicial Findings and Order for Sex Offenders—Active Punishment." Defendant was convicted upon a guilty plea of taking indecent liberties with a child in violation of N.C.G.S. § 14-202.1. According to N.C.G.S. § 14-208.6(5), the offense of taking indecent liberties with a child in violation of N.C.G.S. § 14-202.1 is defined as a "sexually violent offense," which is a reportable conviction under N.C.G.S. § 14-208.6(4). When the court rendered its 25 August 2009 order in open court, the court first mistakenly stated that defendant's reportable offense was an offense against a minor, which is the subject of Box 1(a) in the "Findings" section of Form AOC-CR-615. Although the court immediately realized its error and instructed that Box 1(b) should be marked to indicate that "the defendant has been convicted of a reportable conviction under G.S. 14-208.6, specifically . . . a sexually violent offense under G.S. 14-208.6(5)," the form included in the record indicates that Box 1(a), rather than Box 1(b), was marked on the order signed by the court.

"We realize that in the process of checking boxes on form orders, it is possible for the wrong box to be marked inadvertently, creating

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a clerical error which can be corrected upon remand.” *State v. Yow*, — N.C. App. —, —, 693 S.E.2d 192, 194 (2010). “When, on appeal, a clerical error is discovered in the trial court’s judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record ‘speak the truth.’” *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) (quoting *State v. Linemann*, 135 N.C. App. 734, 738, 522 S.E.2d 781, 784 (1999)). A “clerical error” has been defined as “[a]n error resulting from a minor mistake or inadvertence, [especially] in writing or copying something on the record, and not from judicial reasoning or determination.” *State v. Jarman*, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000) (quoting, but not explicitly adopting, *Black’s Law Dictionary* 563 (7th ed. 1999)). Since, in the present case, it appears the court’s error in marking Box 1(a) instead of Box 1(b) was clerical in nature, and since defendant admits that he pled guilty to one count of taking indecent liberties with a child, which he concedes is a “sexually violent offense,” we remand this matter to the trial court for the limited purpose of correcting the clerical error on Form AOC-CR-615 by marking Box 1(b) and unmarking Box 1(a).

[2] Defendant’s remaining contentions concern issues that defendant concedes have already been resolved by this Court. As he advances no further or alternative legal argument in support of these issues and purports only to “preserve” these issues “for further review,” we decline to address defendant’s remaining contentions. The order requiring defendant to enroll in lifetime satellite-based monitoring upon his release from incarceration is affirmed. This matter is remanded for correction of the clerical error noted herein.

Affirmed; remanded for correction of clerical errors.

Judges STROUD and ERVIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 21 SEPTEMBER 2010)

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| ALSTON v. GRANVILLE HEALTH SYS. No. 09-1540 | Granville (09CVS306) | Reversed |
| BAXTER v. DANNY NICHOLSON, INC. No. 07-865-2 | Industrial Commission (IC687008) | Affirmed |
| BURROUGHS v. LASER RECHARGE OF CAROLINAS, INC. No. 09-1624 | Industrial Commission (584372) | Affirmed |
| IN RE D.W. No. 10-379 | Orange (06JT60) | Affirmed |
| IN RE L.R. No. 10-302 | Pamlico (09JA07) | 09JA07 Affirmed. 07CVD240- Affirmed in part, Reversed and remanded in part. |
| IN RE M.G.S. No. 10-228 | Yadkin (08JT29) | Affirmed |
| IN RE N.A.B. No. 10-462 | Buncombe (07JT455) | Affirmed |
| PATTEN v. WERNER No. 10-48 | Onslow (02CVD1567) | Affirmed |
| STATE v. BARNHILL No. 10-74 | New Hanover (08CRS61046) | No Error |
| STATE v. BATEMAN No. 10-102 | Cherokee (07CRS50728) | No Error |
| STATE v. BRIGMAN No. 10-46 | Scotland (03CRS51585) | Affirmed |
| STATE v. CHAMBERS No. 10-146 | Rowan (06CRS58415) | No Error |
| STATE v. CHAVIS No. 10-285 | Moore (09CRS3) | No Error |

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| STATE v. DENTON No. 09-1322 | Mecklenburg (08CRS22550) (07CRS212994) | No prejudicial error |
| STATE v. GRAHAM No. 09-1371 | Chowan (07CRS479) | No Error |
| STATE v. HOBGOOD No. 10-206 | Moore (07CRS53817) (07CRS53819) (07CRS53797) (07CRS53822) | Affirmed |
| STATE v. HORTON No. 09-1143 | Person (08CRS52692) (08CRS52715) | No error in part, Remanded in part |
| STATE v. LEE No. 09-1533 | Yancey (06CRS50759-62) | No Error |
| STATE v. LEWIS No. 10-59 | Forsyth (08CRS59465) | No Error |
| STATE v. MCCOY No. 09-1487 | Edgecombe (08CRS52046) (08CRS51687) (08CRS3507) | No Error |
| STATE v. MELVIN No. 10-264 | Onslow (07CRS52978) | No Error |
| STATE v. ROSS No. 09-1638 | Stokes (07CRS50531) (06CRS52342-43) | No Error |
| STATE v. SPEARS No. 10-52 | Caldwell (06CRS4025) (05CRS7565) | No Error |
| STATE v. VAUGHAN No. 10-166 | Rockingham (07CRS53591) (07CRS53682) | No error at trial; SBM order reversed |
| STATE v. WEBB No. 09-1433 | Sampson (08CRS710) (07CRS50382) | No Error |
| STATE v. WHITLEY No. 10-316 | Mecklenburg (08CRS212279-80) | Reversed and Remanded |

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| STATE v. WILLIAMS No. 09-1663 | Wake (07CRS66576) (07CRS63953) | Affirmed |
| UNDERWOOD v. UNDERWOOD No. 08-1131-2 | Catawba (97CVD2123) | Reversed and Remanded |
| WALKER v. DEPT' OF STATE TREASURER No. 09-1023 | Rockingham (08CVS1918) | Affirmed |
| WILLIAMS v. RAINEY No. 09-707 | Cumberland (08CVS4978) | Affirmed |

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[207 N.C. App. 267 (2010)]

STATE OF NORTH CAROLINA v. JAMES JUNIOR BLUE

No. COA09-1717

(Filed 5 October 2010)

1. Homicide— first-degree murder—motion to dismiss—sufficiency of evidence—premeditation and deliberation

The trial court did not err by denying defendant's motion to dismiss the charge of first-degree murder. The State offered evidence, through defendant's own statement, that he formed the intent to kill his grandmother and contemplated whether he would be caught before he began the attack. Although there was evidence presented that defendant had consumed alcohol and cocaine prior to his assault on the victim, the evidence did not establish that his intoxication was such as to negate the possibility of premeditation and deliberation as a matter of law.

2. Robbery— dangerous weapon—motion to dismiss—sufficiency of evidence—continuous transaction

The trial court did not err by denying defendant's motion to dismiss the charge of robbery with a dangerous weapon. There was no evidence that defendant had his grandmother's permission to take money from her wallet. The evidence was sufficient to show the theft and the use of force were part of a continuous transaction. The rape of the victim did not constitute a break in the chain of events. Further, the elements of the use of force by a dangerous weapon endangering the victim's life were established by independent evidence corroborating defendant's confession.

3. Rape— first-degree rape—second-degree rape—motion to dismiss—sufficiency of evidence—penetration

The trial court did not err by denying defendant's motion to dismiss the charge of first-degree rape and the lesser-included offense of second-degree rape. There was sufficient independent physical evidence establishing the trustworthiness of defendant's statement that he had sex with his grandmother, thus satisfying the element of penetration.

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4. Constitutional Law— right to confrontation—testimony about autopsy findings—participation by testifying doctor

Even assuming *arguendo* that defendant preserved his constitutional objection to a doctor giving his opinion on the cause of death based on an autopsy and findings by another doctor, defendant's argument failed because the testifying doctor also participated in the autopsy.

5. Indictment and Information— short-form indictments—constitutionality—first-degree murder—first-degree rape

Short form indictments were sufficient to charge a defendant with first-degree murder and first-degree rape.

Appeal by defendant from judgments entered 17 December 2008 by Judge Ola M. Lewis in Robeson County Superior Court. Heard in the Court of Appeals 17 August 2010.

Roy Cooper, Attorney General, by Robert C. Montgomery, Special Deputy Attorney General, and John G. Barnwell, Assistant Attorney General, for the State.

William D. Spence, for defendant-appellant.

MARTIN, Chief Judge.

Defendant was indicted for first degree rape, robbery with a dangerous weapon, and first degree murder. He entered pleas of not guilty. Following a trial, a jury found defendant guilty of second degree rape, robbery with a dangerous weapon, and first degree murder. He appeals from the judgments entered upon the verdicts. After careful consideration of the arguments presented on appeal, we conclude defendant received a fair trial, free from prejudicial error.

The evidence at defendant's trial tended to show that the defendant lived with his mother, Gail Blue Bullard, his step-father, James Bullard, and his twelve-year-old daughter in Maxton, North Carolina. The first week of November 2005, James Bullard became ill and required hospitalization. In order that she might attend to her husband in the hospital, Gail Bullard arranged for her mother, Shirley Locklear, to come to her home to care for defendant's daughter. On the following Saturday, 5 November, Mrs. Locklear's daughter, Flora May Hunt, went to the Bullard home to take Mrs. Locklear supper and took defendant's daughter home with her to spend Saturday night.

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Before leaving, Ms. Hunt arranged for Mrs. Locklear to call her the next morning and go to church.

On Sunday, 6 November, Mrs. Locklear did not call Ms. Hunt, nor did she go to church. That afternoon, Ms. Hunt went to the Bullard home to check on Mrs. Locklear. Defendant was at the home, but Mrs. Locklear was not there. Defendant told Ms. Hunt that Mrs. Locklear's sister, "Aunt Otis", had come by and that Mrs. Locklear had gone with her. Ms. Hunt checked with "Aunt Otis" and learned that Mrs. Locklear was not with her. When Ms. Hunt questioned defendant further about his grandmother's whereabouts, he became upset and left in his mother's Mustang automobile.

Ms. Hunt notified other family members that Mrs. Locklear was not at the Bullard home. Family members searched the area around the house but were unable to locate Mrs. Locklear. The Robeson County Sheriff's Department was notified that Mrs. Locklear was missing. Officers were sent to the Bullard home and took a report. They were called back to the home early on the morning of 7 November when it was reported that a rug was missing from the kitchen area of the residence. At that point, they found some blood spatters in the kitchen and a broken ceiling fan blade.

Jeffrey Blue, Mrs. Locklear's son and defendant's uncle, saw defendant driving the Mustang in the early morning hours of 7 November and began following him. Defendant accelerated and began swerving as Jeffrey Blue followed him into Hoke County. Jeffrey Blue called 911. He followed defendant onto a dirt road, where defendant drove the Mustang into a ditch, got out of the car, and began running. Jeffrey Blue chased defendant, tackled him, and restrained him until Robeson County Deputy Sheriff Bass arrived and placed defendant in handcuffs. Jeffrey Blue asked defendant if Mrs. Locklear was alive and defendant answered "no."

Defendant was taken by Deputy Bass to a convenience store in Maxton where they were met by Detectives Randy McGirt and Ricky Britt. The detectives read defendant his *Miranda* rights, and defendant agreed to talk with them and to show them where Mrs. Locklear's body was located. Defendant told Detective Britt that he had a drug problem and that he had taken \$200 from his grandmother. Defendant led the officers and Jeffrey Blue to a dirt logging road where they found a body wrapped in a green and white rug and a blue tarp, tied with wire. Defendant told the officers that the body was that of his grandmother, Mrs. Locklear, and that he had beaten her with a piece

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of wood and a pot and choked her with a cord. He also told the officers that he had sex with Mrs. Locklear before he killed her.

Defendant was taken to the Robeson County Sheriff's Department, where he was interviewed by Detective Britt and SBI Special Agent Trent Bullard. He was cooperative, reviewed the written statement which the officers had prepared from the interview, made some changes, and then signed the statement. In his statement, he said that he had consumed crack cocaine and alcohol, and that after Flora Hunt had left the house with his daughter, he "just stood around trying to find a way to get some more money so [he] could get some more cocaine." He described how he got a piece of wood from the porch and went into the house. Defendant stated:

Nobody was there but grandmother. After I got inside she was sitting in a chair in the living room. I walked in my bedroom and I just stood there. I just stood there about 15 minutes, and I was thinking. I was thinking was it worth killing Grandmother and could I get away with it. I didn't want to ask Grandmother for the money because she would have known it was for dope. I believe if I would have asked her that she would have given me some money.

He then described how, while his grandmother was still sitting in her chair, he hit her on the head with the piece of wood. She stood up, and he hit her again. The second time he hit her, the wood broke. They began to struggle, and defendant began to beat her on the head with a cooking pot. Defendant hit her with the pot "about seven times" and kicked her twice. While beating her with the pot, defendant broke a blade off the ceiling fan. He said that while his grandmother was still alive and telling him to stop, he pulled her nightgown over her face, had sex with her, and ejaculated inside of her.

Defendant said that he then went to the bathroom to clean up. When he returned, his grandmother was still making noises in the kitchen. Defendant cut the cord off a recording machine and wrapped it around her neck, and put tape over her nose and mouth.

Defendant said that he searched for, and found, his grandmother's wallet and took money out of it. After cleaning up some blood, defendant left the house and went to buy cocaine and beer. Returning home, defendant smoked some of the cocaine, and then got a blue tarp, Clorox, and rags to do more cleaning. He rolled up Mrs. Locklear's body in the tarp, tied it with wire, and loaded it into a cart, which he towed with his mother's car to the ditch where it was

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later found. Deputy Bruce Meares, a crime scene investigator with the Robeson County Sheriff's Department, testified that when he unwrapped the tarp from Mrs. Locklear's body, there was a strong odor of Clorox. Deputy Meares also went to the Bullard residence where he collected samples of blood stains, a pot, a tape recorder with the cord cut off, and various other items. Defendant consented to providing hair and saliva samples.

North Carolina Chief Medical Examiner Dr. John Butts participated in an autopsy of Mrs. Locklear's body on 8 November 2005. Dr. Butts testified that there were multiple fractures to Mrs. Locklear's skull, injury to her underlying brain, multiple fractured ribs, and a fracture to her backbone. Dr. Butts also testified that there was a tear and bruising in the opening of Mrs. Locklear's vagina. Dr. Butts further testified that pressure had been applied to her throat and that there was a ligature mark around Mrs. Locklear's neck which was consistent with the electrical cord found with her body. Dr. Butts opined that Mrs. Locklear died "as a result of multiple blows to the head fracturing the skull, but she also had evidence of ligature strangulation." Vaginal and rectal smears taken during the autopsy revealed the presence of spermatozoa and a forensic DNA analyst with the SBI testified that defendant could not be excluded as a contributor to the DNA profile obtained from the sperm fraction of the vaginal swabs taken from the victim.

Defendant did not testify, but offered evidence through the testimony of Floyd Freeman, Jr. that he had bought cocaine from Freeman three times on 5 November 2005. Freeman testified that when he sold defendant cocaine for the third time, around 11:30 p.m., that he told defendant he should not be driving because he had been drinking. On cross-examination, Freeman testified that defendant was understandable, but slurring, was not having any problems driving, and had no trouble counting his money.

I.

On appeal, defendant challenges the sufficiency of the State's evidence to submit to the jury the charges of first degree murder, robbery with a dangerous weapon, and rape, and contends the trial court erred by denying his motions to dismiss those charges. In reviewing these arguments, our review is limited to determining "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is

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properly denied.’” *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). “In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences.” *Id.* at 378-79, 526 S.E.2d at 455 (citing *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992)). “Further, ‘[t]he defendant’s evidence, unless favorable to the State, is not to be taken into consideration.’” *State v. Hood*, 332 N.C. 611, 621, 422 S.E.2d 679, 685 (1992) (quoting *State v. Jones*, 280 N.C. 60, 66, 184 S.E.2d 862, 866 (1971)), *cert. denied*, 507 U.S. 1055, 123 L. Ed. 2d 659 (1993).

A.

[1] Defendant first argues that the trial court erred in denying his motion to dismiss the charge of first degree murder. Defendant contends that the evidence presented by the State was insufficient to establish that he killed Mrs. Locklear with premeditation and deliberation or that he killed her in the perpetration of robbery with a dangerous weapon.

i.

With respect to the charge of first degree murder with premeditation and deliberation, defendant argues that the relationship between him and Mrs. Locklear shows that he did not act in a “cool state of blood” and that any purpose to kill her “was formed and immediately executed in a passion” caused by impairment due to his consumption of alcohol and crack cocaine. Thus, he argues, without citing any precedent, that he could not have formed the specific intent to kill Mrs. Locklear. His argument is wholly without merit.

In *State v. Chapman*, 359 N.C. 328, 611 S.E.2d 794 (2005), our Supreme Court explained premeditation and deliberation in the context of first degree murder.

“ ‘Premeditation means that [the] defendant formed the specific intent to kill the victim for some length of time, however short, before the actual killing.’ ” “ ‘Deliberation’ means that the defendant formed the intent to kill in a cool state of blood and not as a result of a violent passion due to sufficient provocation.’ ” “Specific intent to kill is an essential element of first degree murder, but it is also a necessary constituent of the elements of premeditation and deliberation.” “Thus, proof of premeditation and deliberation is also proof of intent to kill.”

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Id. at 374, 611 S.E.2d at 827 (citations omitted) (quoting *State v. Cagle*, 346 N.C. 497, 508, 488 S.E.2d 535, 543 (1997) (alteration in original); *State v. Truesdale*, 340 N.C. 229, 234, 456 S.E.2d 299, 302 (1995); *State v. Jones*, 303 N.C. 500, 505, 279 S.E.2d 835, 838-39 (1981)). “ ‘If the design to kill was formed with deliberation and premeditation, it is immaterial that defendant was in a passion or excited when the design was carried into effect.’ ” *State v. Misenheimer*, 304 N.C. 108, 113-14, 282 S.E.2d 791, 795 (1981) (quoting *State v. Faust*, 254 N.C. 101, 108, 118 S.E.2d 769, 773, *cert. denied*, 368 U.S. 851, 7 L. Ed. 2d 49 (1961)).

In the present case, the State offered evidence, through defendant's own statement, that he formed the intent to kill Mrs. Locklear, and contemplated whether he would be caught, before he began the attack. This evidence is sufficient to demonstrate that defendant formed the intent to kill in a cool state of blood. *See Hood*, 332 N.C. at 622, 422 S.E.2d at 685 (holding that there was no error in denying defendant's motion to dismiss when evidence showed that victim did not provoke defendant and defendant had ample time to deliberate the killing).

As for defendant's contention that he was incapable, as a matter of law, of forming the specific intent to kill Mrs. Locklear due to his alcohol and crack cocaine induced intoxication, our Supreme Court, in considering an argument similar to that advanced by defendant, has stated:

[d]efendants have cited no case, and our research has revealed none, in which any court has dismissed a charge of murder in the first degree on the ground that all the evidence tended to show a degree of intoxication which negated the possibility of premeditation and deliberation as a matter of law. On the contrary, when a defendant has committed an overt lethal act, the decision has been that whether his 'intoxication (was) so gross as to preclude a capacity intentionally to kill is normally a fact issue for the jury to resolve.' . . . 'As a general rule, it is for the jury to determine whether the mental condition of [the] accused was so far affected by intoxication that he was unable to form a guilty intent, unless the evidence is not sufficient to warrant the submission of the question to the jury.'

State v. Hamby, 276 N.C. 674, 679, 174 S.E.2d 385, 388 (1970) (citing *King v. State*, 392 P.2d 310, 311 (Nev. 1964); 23A C.J.S. Criminal Law § 1131 (1961); *State v. Marsh*, 234 N.C. 101, 66 S.E.2d 684 (1951); *State v. Hammonds*, 216 N.C. 167, 3 S.E.2d 439 (1939)), *death sen-*

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tence vacated, 408 U.S. 937, 33 L. Ed. 2d 754 (1972). Our research reveals that the rule recited in *Hambly* is still good law. Although there was evidence presented in the State's case in chief that defendant had consumed alcohol and cocaine prior to his vicious assault on Mrs. Locklear, that evidence did not establish that his intoxication was such as to negate the possibility of premeditation and deliberation as a matter of law. Contrary to defendant's assertion, evidence that his drug dealer believed he was too impaired to drive does not show he was incapable of forming the intent to kill. *See State v. Bunn*, 283 N.C. 444, 460, 196 S.E.2d 777, 788 (1973) (recognizing that one may be sufficiently intoxicated to be guilty of driving while impaired "and yet be quite capable of forming and carrying out a specific intent to kill."). Moreover, defendant's conduct subsequent to the killing belies his assertion of incapacitating intoxication. *See State v. Hunt*, 345 N.C. 720, 728, 483 S.E.2d 417, 422 (1997) (dismissing defendant's argument that he was too intoxicated to form the specific intent to kill when he acted rationally in disposing of the victim's body and cleaning himself and the scene, and, in a later statement to police, he was able to recall how he had stabbed the victim and disposed of the body).

ii.

Because we hold that there was sufficient evidence to overcome defendant's motion to dismiss the charge of first degree murder based on premeditation and deliberation, we need not address his argument regarding the alternate theory of felony murder. *See State v. Britt*, 132 N.C. App. 173, 178, 510 S.E.2d 683, 687 ("We need not reach defendant's argument regarding the felony murder rule, because defendant's conviction predicated on the theory of murder with premeditation and deliberation was without error."), *disc. review denied*, 350 N.C. 838, 538 S.E.2d 571 (1999).

B.

[2] Defendant next contends the trial court erred in denying his motion to dismiss the charge of robbery with a dangerous weapon. Defendant contends first that the State failed to present sufficient evidence that the theft and the use of force were part of a continuous transaction, and second that there was a lack of corroborating evidence to support the submission of the robbery charge based on the *corpus delicti* rule.

Robbery with a dangerous weapon, a statutory crime pursuant to N.C. Gen. Stat. 14-87 (2009), is defined as: "(1) the unlawful taking or an attempt to take personal property from the person or in the pres-

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ence of another (2) by use or threatened use of a firearm or other dangerous weapon (3) whereby the life of a person is endangered or threatened.” *State v. Small*, 328 N.C. 175, 181, 400 S.E.2d 413, 416 (1991) (citing *State v. Beaty*, 306 N.C. 491, 496, 293 S.E.2d 760, 764 (1982)). “The gist of the offense is not the taking but the taking by force or putting in fear.” *Powell*, 299 N.C. at 102, 261 S.E.2d at 119 (citing *State v. Swaney*, 277 N.C. 602, 611, 178 S.E.2d 399, 405, *appeal dismissed, cert. denied*, 402 U.S. 1006, 29 L. Ed. 2d 428 (1971)). “Furthermore, it is immaterial whether the intent was formed before or after force was used upon the victim, provided that the theft and force are aspects of a single transaction.” *State v. Faison*, 330 N.C. 347, 359, 411 S.E.2d 143, 150 (1991).

Defendant relies on *Powell* and *State v. McLemore*, 343 N.C. 240, 470 S.E.2d 2 (1996), to support his contention that there was insufficient evidence that the theft and the use of force were part of a continuous transaction. In *Powell*, the defendant was found guilty of first degree murder, first degree rape, and robbery with a dangerous weapon. *Powell*, 299 N.C. at 96, 261 S.E.2d at 115. Our Supreme Court held that the trial court erred in submitting the robbery charge to the jury when the “arrangement of the victim’s body and the physical evidence indicate she was murdered during an act of rape,” and the evidence showed that defendant stole her television and vehicle as an afterthought. *Id.* at 102, 261 S.E.2d at 119. The Court therefore reversed *Powell*’s conviction for robbery with a dangerous weapon. *Id.* In *McLemore*, the defendant was convicted of, among other things, first degree murder and robbery with a dangerous weapon. *McLemore*, 343 N.C. at 243-44, 470 S.E.2d at 3-4. Our Supreme Court held that the trial court erred in denying *McLemore*’s motion to dismiss the charge of armed robbery when the evidence “was insufficient to show that the defendant used a weapon to force the victim to give him her car.” *Id.* at 244, 470 S.E.2d at 4. Rather, the evidence showed that “the defendant had permission to use the car and had often done so in the past[.]” *Id.* at 245, 470 S.E.2d at 4. The Court concluded that there was “no evidence that the taking of the Cadillac was part of a single continuous transaction that involved the use of a firearm.” *Id.*

Citing those cases, defendant contends the evidence in the present case does not show a series of events constituting one continuous transaction. Defendant maintains, instead, that there were “three separate, horrible, isolated crimes explainable only by cocaine and alcohol.” In any event, he asserts the rape constitutes a break in the chain of events leading from what he describes, without explanation, as the “initial

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felony”, to the act causing death. He attempts to analogize this case to *Powell*, and asserts that “[t]his appeal is the same as *McLemore*.”

Unlike *McLemore*, however, there is no evidence in the present case that defendant had his grandmother’s permission to take the money from her wallet. While he stated in his confession that he knew his grandmother would have given him money if he had asked her for it, that is a very different thing from having permission to take the money without asking. And, unlike *Powell*, there is evidence here that defendant formed the intent to rob his grandmother before he began his attack. Indeed, defendant told the officers that “I didn’t want to ask Grandmother for the money because she would have known it was for dope.”

Having formed this intent, defendant attacked his grandmother with a piece of wood and a cooking pot, before strangling her with an electrical cord and taping her mouth. He then found her wallet and took her money. This evidence is sufficient to show the theft and the use of force were part of a continuous transaction. See *State v. Fields*, 315 N.C. 191, 203, 337 S.E.2d 518, 525 (1985) (holding there was sufficient evidence of continuous transaction where defendant took shotgun from the body of fallen victim he had shot); *State v. Stitt*, — N.C. App. —, —, 689 S.E.2d 539, 552 (2009) (holding there was sufficient evidence of continuous transaction when defendant killed the victims and then took their property, “not as a mere afterthought, but with the intent of utilizing the vehicle and cellular telephones, and selling other personal property”), *disc. review denied*, 364 N.C. 246, — S.E.2d — (2010).

Furthermore, to accept defendant’s contention that rape constituted a break in the chain of events sufficient to interrupt an otherwise continuous transaction would compel the perverse result that one could insulate a theft from the force by which it was accomplished by means of committing the additional atrocity of rape. Our Supreme Court has rejected an analogous argument where a defendant contended that the killing of a robbery victim should preclude conviction for armed robbery where the property was taken after the fatal wound was inflicted based upon the proposition that a corpse is incapable of possessing property. See *Fields*, 315 N.C. at 201-02, 337 S.E.2d at 524-25. We decline to allow a defendant to use one heinous crime to shield himself from criminal liability for another.

Defendant also argues that the State failed to present sufficient evidence from which the jury could reasonably conclude that he com-

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mitted robbery with a dangerous weapon because the only evidence of that crime was provided by his confession to the officers. Under the *corpus delicti* rule, the State may not rely solely on the extrajudicial confession of a defendant, but must produce substantial independent corroborative evidence that supports the facts underlying the confession. *State v. Parker*, 315 N.C. 222, 236, 337 S.E.2d 487, 495 (1985). Defendant argues that the State failed to produce substantial independent corroborative evidence to show that the crime of armed robbery actually occurred.

In *Parker*, the defendant was convicted of two counts of first degree murder and two counts of armed robbery. *Id.* at 224, 337 S.E.2d at 488. On appeal, he argued “there was no evidence of the *corpus delicti* of that armed robbery.” *Id.* at 227, 337 S.E.2d at 490. Our Supreme Court adopted the rule that

in non-capital cases . . . when the State relies upon the defendant’s confession to obtain a conviction, it is no longer necessary that there be independent proof tending to establish the *corpus delicti* of the crime charged if the accused’s confession is supported by substantial independent evidence tending to establish its trustworthiness, including facts that tend to show the defendant had the opportunity to commit the crime.

Id. at 236, 337 S.E.2d at 495. The Court proceeded to apply the rule, noting that “[t]he *corpus delicti* of the murders was proven by evidence independent of the defendant’s confession.” *Id.* When evaluating the *corpus delicti* of the armed robbery in *Parker*, the Court held:

that under the particular facts presented in this case, where the defendant was charged with multiple crimes; the *corpus delicti* as to the more serious offenses was established independently of the defendant’s confession; an element of the crime, use of a deadly weapon, was also established by independent evidence; and the State’s evidence closely paralleled the defendant’s statements as to the manner in which he committed the offenses, there was sufficient corroborative evidence to bolster the truthfulness of the defendant’s confession and to sustain a conviction as to the . . . armed robbery even though there was no independent evidence tending to prove the *corpus delicti* of that crime.

Id. at 238-39, 337 S.E.2d at 496-97.

Defendant does not contest the sufficiency of the State’s evidence to corroborate his confession as to the murder of Mrs. Locklear;

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indeed, in all relevant particulars, the State's evidence supports the sequence of events as narrated by defendant. The same evidence corroborates the defendant's confession with respect to the elements of robbery with a dangerous weapon. Defendant stated that he struck Mrs. Locklear multiple times on the head with a piece of wood and a pot; those items were recovered from the scene of the crime and the medical examiner opined that Mrs. Locklear died as a result of multiple blows to the head. Defendant stated that he strangled his grandmother with an electrical cord; the medical examiner testified that her body exhibited evidence of ligature strangulation and deputies testified that the cord was found with the victim's body. Defendant described to the officers how he cleaned with Clorox and wrapped the victim's body in a blue tarp; the State's evidence showed that her body was found wrapped in a blue tarp and had a strong odor of Clorox. Finally, defendant's own witness testified that defendant used cash to purchase cocaine on the night of the homicide, corroborating defendant's confession that he had taken Mrs. Locklear's cash from her wallet. Thus, the elements of the use of force by a dangerous weapon endangering the victims's life were established by independent evidence corroborating defendant's confession.

On the basis of *Parker*, we hold that this evidence was sufficiently corroborative to bolster the trustworthiness of the defendant's confession and to sustain his conviction of armed robbery. See *State v. Ash*, 193 N.C. App. 569, 575, 668 S.E.2d 65, 70 (2008) (holding that defendant's confession to homicide and robbery was corroborated by ballistics evidence recovered from the scene of the killing, and evidence "that defendant hid in hotel rooms, which were paid with cash and reserved in his mother's name."), *disc. review denied*, 363 N.C. 130, 673 S.E.2d 363 (2009).

C.

[3] On similar grounds, defendant contends the trial court erred in denying his motion to dismiss the charge of first degree rape and the lesser included offense of second degree rape because the State failed to satisfy the *corpus delicti* rule by offering sufficient independent evidence to corroborate defendant's statement that he "had sex with [the victim] . . . [and] shot off in her" so as to establish the necessary element of penetration.

One of the elements of rape is the penetration, however slight, of the sexual organ of the female by the sexual organ of the male. *State v. Johnson*, 317 N.C. 417, 433-35, 347 S.E.2d 7, 17-18 (1986) (construing

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N.C. Gen. Stat. § 14-27.2, defining first degree rape), *superseded by statute on other grounds as stated by State v. Moore*, 335 N.C. 567, 594, 440 S.E.2d 797, 812-13, *cert. denied*, 513 U.S. 898, 130 L. Ed. 2d 174 (1994).

Our State Supreme Court in *State v. Johnson*, 317 N.C. 343, 346 S.E.2d 596 (1986), addressed a similar appeal where a defendant argued that the trial court erred in refusing to dismiss the charge of rape because the State failed to establish the *corpus delicti* of the crime. *Id.* at 372, 346 S.E.2d at 612. Our Supreme Court disagreed:

With regard to the first-degree rape charge, in addition to the stab wounds there was a bruise on the victim's face and bite marks over her left breast and thigh. The pattern of bloodstains in the car suggest that she was dragged out of it. Her clothes were found pulled and torn in a fashion which left her body exposed from her neck to her ankles. The small amount of semen found in her vagina was consistent with defendant's statement that he penetrated [the victim] but did not complete ejaculation. The fact that defendant possessed a knife with traces of blood on it which could have produced the stab wounds corroborates his admission that the knife was the one he used to stab [the victim]. We hold that there was sufficient extrinsic evidence admitted at trial to support the jury's findings that the . . . rape occurred in the instant case.

Id. at 373-74, 346 S.E.2d at 613.

In the present case, the State's evidence showed that the victim's body was found partially nude. An autopsy revealed a small tear at the base of the opening of her vagina and areas of bruising and scraping on the surface of the skin inside her vagina. Examination of the rape kit samples from the victim's vagina and rectum showed the presence of spermatazoa. A forensic analysis showed that defendant could not be excluded as a contributor of the weaker DNA profile from the sperm fraction of the vaginal swabs taken from the victim. As in *Johnson*, this is substantial independent evidence tending to establish the trustworthiness of defendant's statement that he had sex with his grandmother and "shot off in her," satisfying the element of penetration.

Based on the foregoing, we hold that the trial court did not err in denying defendant's motions to dismiss each of the charges against him at the close of all of the evidence.

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II.

[4] Defendant also contends the trial court erred in permitting Dr. Butts to testify, describe the autopsy and its findings, and give his opinion as to the cause of death. Defendant argues that Dr. Trobbiana, rather than Dr. Butts, personally performed the autopsy, and, therefore Dr. Butts' testimony was inadmissible hearsay and deprived him of his right to confrontation under the State and Federal Constitutions. The State responds that defendant has not preserved his challenge to Dr. Butts' testimony.

Hearsay is defined by statute as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2009). The Sixth Amendment to the United States Constitution provides in part that "[i]n all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. "The Confrontation Clause of the Sixth Amendment bars admission of testimonial evidence unless the declarant is unavailable to testify and the accused has had a prior opportunity to cross-examine the declarant." *State v. Locklear*, 363 N.C. 438, 452, 681 S.E.2d 293, 304 (citing *Crawford v. Washington*, 541 U.S. 36, 68, 158 L. Ed. 2d 177, 203 (2004); *State v. Lewis*, 361 N.C. 541, 545, 648 S.E.2d 824, 827 (2007)), *clarification denied*, 363 N.C. 660, 684 S.E.2d 439 (2009). In *Locklear*, our Supreme Court held that the trial court violated the defendant's rights in admitting "forensic analyses performed by a forensic pathologist and a forensic dentist who did not testify." *Id.* at 452, 681 S.E.2d at 305.

We need not determine whether defendant has properly preserved his constitutional objection because, even assuming *arguendo* that he has, his argument still fails.

As defendant acknowledges, Dr. Butts testified that he participated in the autopsy examination. He testified as follows:

Q: Dr. Butts, did you participate in an autopsy examination on November the 8th of 2005 of the body of Shirley Blue Locklear?

A: Yes, sir.

Q: Who else participated in that autopsy examination?

A: Well, there were two other individuals, one was an assistant working in the office, Mr. Garrity, and the third person was Dr. Trobbiani who was our forensic pathology fellow at that time.

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Dr. Butts' participation in the autopsy is furthered evidenced by the fact that he, along with Dr. Trobbiani, signed the autopsy report. It is evident from his testimony that Dr. Butts was testifying as to his own observations and providing information rationally based on his own perceptions. Indeed, defendant points us to no portion of Dr. Butts' testimony in which he sought to testify as to the declarations or findings of anyone other than himself. *See Crawford*, 541 U.S. at 59 n.9, 158 L. Ed. 2d at 197-98 n.9 (2004) ("The [Confrontation] Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it."). Thus, we hold the trial court did not err in permitting Dr. Butts to testify as to the autopsy findings.

III.

[5] Defendant's remaining arguments are directed at the sufficiency of the bills of indictment for first degree murder and first degree rape. He contends both indictments, commonly referred to as "short-form indictments," violated his rights under the State and Federal constitutions since they failed to allege all of the elements of those offenses. As he readily acknowledges, the issue of the sufficiency of these short-form indictments has been repeatedly decided against him. *See State v. Allen*, 360 N.C. 297, 316-17, 626 S.E.2d 271, 286 (short-form indictment for first degree murder), *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006); *State v. Wallace*, 351 N.C. 481, 508, 528 S.E.2d 326, 343 (short-form indictment for first degree murder, first degree rape and first degree sexual offense) *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000), *reh'g denied*, 531 U.S. 1120, 148 L. Ed. 2d 784 (2001). Insofar as defendant requests this Court to "re-examine this issue and its prior adverse rulings," we remind defendant that we are bound by the precedent of the North Carolina Supreme Court. *State v. Gillis*, 158 N.C. App. 48, 53, 580 S.E.2d 32, 36, *disc. review denied*, 357 N.C. 508, 587 S.E.2d 887 (2003).

No error.

Judges HUNTER and CALABRIA concur.

IN RE GARDNER v. TALLMADGE

[207 N.C. App. 282 (2010)]

IN THE MATTER OF REGISTRATION OF A[N] OHIO JUDGMENT: MICHAEL J. GARDNER, PLAINTIFF V. BRUCE TALLMADGE, DBA TALLMADGE HOLDING CO., LLC, DEFENDANT¹

No. COA10-125

(Filed 5 October 2010)

Judgments— foreign judgments—enforcement—subject matter jurisdiction

The trial court erred in enforcing an Ohio judgment rendered in accordance with the terms of a demand cognovit promissory note (note) because the Ohio court did not have subject matter jurisdiction to enter the judgment. The statutory requirement that the warning language in the note appear in such type size or distinctive marking that it appear more conspicuously than anything else on the document was not met.

Appeal by Defendant from order entered 26 October 2009 by Judge L. Todd Burke in Rockingham County Superior Court. Heard in the Court of Appeals 9 June 2010.

Gerald S. Schafer for Plaintiff-Appellee.

Robertson, Medlin & Blocker, PLLC, by John F. Bloss, for Defendant-Appellant.

STEPHENS, Judge.

I. Procedural History and Factual Background

A. Cognovit Note

Defendant Bruce Tallmadge, dba Tallmadge Holding Co., LLC., executed a demand cognovit promissory note (“Note”) dated 25 March 2004 to Plaintiff Michael J. Gardner which, reproduced here,² reads as follows:

DEMAND COGNOVIT PROMISSORY NOTE

\$200,000.00

Findlay, Ohio

1. Although the caption of the order appealed from states the case number as 09 CVD 842, a consent order was entered transferring the action from district court to superior court. Accordingly, the case number should have changed to 09 CVS 842. Defendant-Appellant acknowledged this in his Notice of Appeal which states that the appeal is from order entered in case number 09 CVS 842.

2. A copy of the actual Note is attached as an appendix to this opinion.

IN RE GARDNER v. TALLMADGE

[207 N.C. App. 282 (2010)]

Maturity Date: Upon Demand

Date of Note:
March 25th, 2004

FOR VALUE RECEIVED, the undersigned, Tallmadge Holding Co., LLC., a North Carolina Limited Liability Company and Bruce Tallmadge (referred to in this Note as the "Borrowers"), promise to pay to the order of Michael J. Gardener (referred to in this Note as "Lender") at 2151 Industrial Drive, Findlay, Ohio 45840, or at such other place as Lender may designate in writing from time to time, in legal tender of the United States, the principal sum of Two Hundred Thousand Dollars (\$200,000.00), together with interest on the unpaid principal balance thereof from the date of this Note at the rate and payable in the manner hereinafter provided.

RATE OF INTEREST AND MANNER OF PAYMENT

Interest on the principal balance of this Note from time to time outstanding shall be charged and owing at an annual rate of Three Hundred Thirty-seven and one-half per cent (337.5%) per annum. Interest in the amount of \$56,250.00 shall be payable monthly in arrears on the first day of each calendar month, commencing **June 1 (BJT)**, 2004 and continuing on the first day of each month thereafter.

Principal shall be due and payable upon demand; provided however, notwithstanding any other provision in this Note, the unpaid principal balance and all accrued and unpaid interest shall be due and payable on or before April 1, 2005.

PREPAYMENT

This Note may be prepaid in whole or in part without payment of any prepayment premium.

SECURITY

This Note is Unsecured.

DEFAULT

The entire unpaid principal balance of this Note and all accrued and accruing interest thereon shall become immediately due and payable by Borrowers to Lender without notice at the option of Lender upon any default in the payment of any amount when due under this Note. In addition, Borrowers shall pay Lender's costs and attorney fees incurred in collecting or enforcing payment, whether suit be brought or not. Any failure of Lender to exercise such option to accelerate shall not constitute a waiver of

IN RE GARDNER v. TALLMADGE

[207 N.C. App. 282 (2010)]

DEMAND COGNOVIT PROMISSORY NOTE = PAGE 2

the right to exercise such option to accelerate at any future time.

Acceptance by Lender of any payment in an amount less than the amount due shall be deemed an acceptance on account only, and the failure to pay the entire amount then due shall be and continue to be an event of default. At any time thereafter and until the entire amount then due has been paid, Lender shall be entitled to exercise all rights conferred upon it in this Note upon the occurrence of a default.

WAIVER

Borrowers, for themselves and their respective heirs, successors and assigns, expressly waive presentment, demand, protest, notice of dishonor, notice of nonpayment, notice of acceleration, notice of maturity, and presentment for the purpose of accelerating maturity.

JOINT AND SEVERAL OBLIGATION OF BORROWERS

This Note shall be the joint and several obligation of Tallmadge Holding Co., LLC, a North Carolina Limited Liability Company, and Bruce Tallmadge, and of all sureties, guarantors and endorsers, and shall be binding upon them and their respective heirs, administrators, executors, successors and assigns.

CONFESSION OF JUDGMENT

Borrowers do each hereby authorize any attorney at law to appear for Borrowers (or either one of the Borrowers) in an action on this Note at any time after the same becomes due, as herein provided, whether by acceleration or otherwise, in any Court of record in or of the State of Ohio or in any other state or territory of the United States, and to waive the issuing and service of process against Borrowers (or either one of the Borrowers), to admit the maturity of this Note by acceleration or otherwise, and to confess judgment in favor of the legal holder of this Note against Borrowers (or either one of the Borrowers) for the amount then due, with interest, late charge(s) and default interest all at the rate(s) herein mentioned, and attorney fees and costs of suit, and to waive and release all errors in said proceedings and judgment and all right to appeal from the judgment rendered.

**GOVERNING LAW SUCCESSORS AND
ASSIGNS AND MISCELLANEOUS**

IN RE GARDNER v. TALLMADGE

[207 N.C. App. 282 (2010)]

This Note is made in the State of Ohio and shall be governed and construed in accordance with its laws. If any provision(s) of this Note are in conflict with any statute or applicable rule of law, or are otherwise unenforceable for any reason whatsoever, such provision(s) shall be deemed null and void to the extent of such conflict or unenforceability but shall be deemed separate from and shall not invalidate any other

DEMAND COGNOVIT PROMISSORY NOTE = PAGE 3

provision of this Note. The rights and remedies provided to Lender in this Note are cumulative and the use of any one right or remedy shall not preclude or waive its ability to use any or all other rights and remedies Lender may have at law or in equity. In this Note, the singular and plural are interchangeable and words of gender shall include all genders. This Note shall, in accordance with its terms, be binding upon Borrowers, and their respective heirs, administrators, executors and assigns. Tallmadge Holding Co., LLC represents that the execution of this Note has been authorized by the governing documents of said limited liability company. The paragraph headings provided in this Note are for convenience only.

IN WITNESS WHEREOF, Borrowers, Tallmadge Holding Co., LLC, a North Carolina Limited Liability Company, and Bruce Tallmadge, have executed and delivered this Note to Lender on the ___ day of March, 2004.

TALLMADGE HOLDING CO., LLC
A North Carolina Limited Liability Co.

By: [Signed Bruce Tallmadge]

Bruce Tallmadge
Its Managing Member

[Signed Bruce Tallmadge]
Bruce Tallmadge, individually
"Borrowers"

WARNING - BY SIGNING THIS PAPER YOU GIVE UP YOUR RIGHT TO NOTICE AND COURT TRIAL. IF YOU DO NOT PAY ON TIME, A COURT JUDGMENT MAY BE TAKEN AGAINST YOU WITHOUT YOUR PRIOR KNOWLEDGE AND THE POWERS OF THE COURT

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CAN BE USED TO COLLECT FROM YOU REGARDLESS OF ANY CLAIMS YOU MAY HAVE AGAINST THE CREDITOR WHETHER FOR RETURNED GOODS, FAULTY GOODS, FAILURE ON HIS PART TO COMPLY WITH THE AGREEMENT, OR ANY OTHER CAUSE.

B. The Ohio Judgment

On 14 January 2009, Plaintiff filed a verified complaint in the common pleas court of Hancock County, Ohio (“Ohio court”) alleging that the Note was in default on 8 December 2008 when Defendant failed to pay the amount owed. Also on 14 January 2009, Steven M. Powell, an attorney designated by Plaintiff, filed an answer on behalf of Defendant. The answer purported to waive the issuance and service of process, confess judgment in favor of Plaintiff, and waive Defendant’s right to appeal.

By judgment entered 26 January 2009, the Ohio court awarded Plaintiff, in accordance with the Note’s terms,

the principal sum of Two Hundred Thousand Dollars (\$200,000.00), with interest and late fees accrued from April 1, 2005 to December 31, 2008, owing on the principal amount at the rate of 337.5% *per annum*, *together with interest* from and after December 31, 2008 together with reasonable attorney’s fees in accordance with the terms of said Promissory Note; for Court costs and expenses incurred herein; and for such other and further relief as this Court deems just and equitable.^[3]

C. The North Carolina Order

On 13 April 2009, Plaintiff filed a notice of filing of foreign judgment in Rockingham County District Court. On 4 May 2009, Defendant filed a motion for relief from and notice of defense to foreign judgment and a motion to transfer the matter to superior court. On 22 June 2009, Judge Edwin G. Wilson, Jr. entered a consent order transferring the action to superior court.

On 26 October 2009, Judge Burke entered an order recognizing and giving full faith and credit to the Ohio judgment, denying Defendant relief from such foreign judgment, and denying Defendant’s request for written findings of fact under Rule 52 of the North Carolina Rules of Civil Procedure. From the order of Judge Burke, Defendant appeals.

3. Based on this Court’s calculations, with interest accruing at a rate of \$56,250.00 per month from 1 April 2005 to 31 December 2008 plus \$200,000.00 in principal, the Ohio court awarded Plaintiff approximately \$2,675,000.00. Additionally, the trial court awarded Plaintiff interest from and after December 31, 2008 and reasonable attorney’s fees.

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II. Discussion

On appeal, Defendant argues that the trial court erred in enforcing the Ohio judgment because: (1) the Ohio court did not have personal jurisdiction, (2) the Ohio court did not have subject matter jurisdiction, (3) Defendant did not receive notice in time to properly defend himself, (4) charging an interest rate of 337.50% is penal in nature, and (5) charging an interest rate of 337.50% is against Ohio and North Carolina public policy.

Because we conclude that the Ohio court did not have subject matter jurisdiction, the trial court's order denying Defendant relief from foreign judgment is reversed. In light of this holding, we need not address Defendant's remaining assignments of error.

*A. North Carolina Law on
the Enforcement of Foreign Judgments*

The Constitution's full faith and credit clause requires states to recognize and enforce valid judgments rendered in sister states. U.S. Const. art. IV, § 1. The Uniform Enforcement of Foreign Judgments Act ("the Act") governs the enforcement of foreign judgments that are entitled to full faith and credit in North Carolina. N.C. Gen. Stat. §§ 1C-1701 *et seq.* (2009). The Act requires that the judgment creditor file with the clerk of superior court a "copy of [the] foreign judgment authenticated in accordance with an act of Congress or the statutes of this State[.]" N.C. Gen. Stat. § 1C-1703(a). After filing a properly authenticated copy of the foreign judgment, the judgment creditor must then give notice of the filing to the judgment debtor. N.C. Gen. Stat. § 1C-1704(a). If the judgment debtor takes no action within thirty days of receipt of the notice to delay enforcement of the judgment, "the judgment will be enforced in this State in the same manner as any judgment of this State." N.C. Gen. Stat. § 1C-1704(b). To delay enforcement of the judgment, the judgment debtor may "file a motion for relief from, or notice of defense to," the judgment on grounds as permitted in the Act. N.C. Gen. Stat. § 1C-1705(a).

Upon the filing of such a motion, enforcement of the judgment is stayed until the judgment creditor "move[s] for enforcement of the foreign judgment." N.C. Gen. Stat. § 1C-1705(b). If a motion for enforcement is filed, a hearing will be held and the trial court will determine if the "foreign judgment is entitled to full faith and credit." *Id.* The burden of proof on the issue of full faith and credit is on the judgment creditor, and the hearing will be conducted in accordance

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with the Rules of Civil Procedure. *Id.* The introduction into evidence of a copy of the foreign judgment, authenticated pursuant to Rule 44 of the Rules of Civil Procedure, establishes a presumption that the judgment is entitled to full faith and credit. *Thomas v. Frosty Morn Meats, Inc.*, 266 N.C. 523, 526, 146 S.E.2d 397, 400 (1966); *Thrasher v. Thrasher*, 4 N.C. App. 534, 540, 167 S.E.2d 549, 553 (1969). The judgment debtor can rebut this presumption upon a showing that the rendering court did not have subject matter jurisdiction or did not have jurisdiction over the parties, that the judgment was obtained by fraud or collusion, that the defendant did not have notice of the proceedings, or that the claim on which the judgment is based is contrary to the public policies of North Carolina. N.C. Gen. Stat. § 1C-1708 (2009); *Morris v. Jones*, 329 U.S. 545, 550-51, 91 L. Ed. 488, 495-96 (1947); *White v. Graham*, 72 N.C. App. 436, 440, 325 S.E.2d 497, 500 (1985); *Webster v. Webster*, 75 N.C. App. 621, 623, 331 S.E.2d 276, 278, *disc. rev. denied*, 315 N.C. 190, 337 S.E.2d 864 (1985).

B. Cognovit Agreements

“The cognovit is the ancient legal device by which the debtor consents in advance to the holder’s obtaining a judgment without notice or hearing, and possibly even with the appearance, on the debtor’s behalf, of an attorney designated by the holder.” *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 176, 31 L. Ed. 2d 124, 128 (1972). “[T]he purpose of the cognovit is ‘to permit the note holder to obtain judgment without a trial of possible defenses which the signers of the notes might assert.’” *Id.* at 177, 31 L. Ed. 2d at 129 (quoting *Hadden v. Rumsey Products, Inc.*, 196 F.2d 92, 96 (2d. Cir. 1952) (applying Ohio law)).

Enforcement of the cognovit varies among states. *Id.* “In Ohio the cognovit has long been recognized by both statute and court decision.” *Id.* at 178, 31 L. Ed. 2d at 129; *see* Ohio Code Rev. Ann. § 2323.13 (2009). Ohio courts, however, “give the instrument a strict and limited construction.” *Id.* at 178, 31 L. Ed. 2d at 130 (citing *Peoples Banking Co. v. Brumfield Hay & Grain Co.*, 179 N.E.2d 53, 55 (Ohio 1961)).

C. Subject Matter Jurisdiction

“Because a judgment from a rendering court is only entitled to the *same* credit, validity and effect in a sister state as it had in the state where it was pronounced, the . . . rendering court must . . . have had subject matter jurisdiction—the power to pass on the merits of the case—before full faith and credit will be granted.” *Boyles v. Boyles*, 308

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N.C. 488, 490-91, 302 S.E.2d 790, 793 (1983) (citations and quotation marks omitted). Thus, a judgment from another state rendered by a court without jurisdiction will not be recognized or enforced in North Carolina. *Id.*

“[A] judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court’s inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment.” *Underwriters Nat’l Assurance Co. v. N.C. Life & Accident & Health Ins. Guaranty Ass’n*, 455 U.S. 691, 706, 71 L. Ed. 2d 558, 571-72 (1982), *rev’g* 48 N.C. App. 508, 269 S.E.2d 688, *cert. denied and appeal dismissed*, 301 N.C. 527, 273 S.E.2d 453 (1980) (citation and quotation marks omitted). However, “if a litigant has no notice of a court proceeding, *a fortiori*, the litigant could not ‘fully and fairly litigate’ any issue in the case.” *Boyles*, 308 N.C. at 492, 302 S.E.2d at 793. Where the subject matter jurisdiction of the court which rendered the judgment has not been fully and fairly litigated, the second court’s inquiry into the court’s subject matter jurisdiction is controlled by “the statutes and decisions of the courts in the state in which the judgment was rendered[.]” *Id.* at 494, 302 S.E.2d at 795 (citation and quotation marks omitted).

It is undisputed in this case that Defendant received no notice of the court proceeding in Ohio which resulted in the judgment against him. Accordingly, we will examine relevant Ohio statutes and judicial decisions to determine whether the Ohio court had subject matter jurisdiction to enter the judgment at issue.

Pursuant to Ohio Rev. Code Ann. § 2323.13,

[a] warrant of attorney to confess judgment contained in any promissory note, bond, security agreement, lease, contract, or other evidence of indebtedness executed on or after January 1, 1974, is invalid and the courts are without authority to render a judgment based upon such a warrant unless there appears on the instrument evidencing the indebtedness, directly above or below the space or spaces provided for the signatures of the makers, or other person authorizing the confession, *in such type size or distinctive marking that it appears more clearly and conspicuously than anything else on the document:*

“Warning—By signing this paper you give up your right to notice and court trial. If you do not pay on time a court judgment may

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be taken against you without your prior knowledge and the powers of a court can be used to collect from you regardless of any claims you may have against the creditor whether for returned goods, faulty goods, failure on his part to comply with the agreement, or any other cause.”

Ohio Rev. Code Ann. § 2323.13(D) (emphasis added). “[A] warrant of attorney is legally insufficient unless it meets the specific objective criteria that the legislature chose to spell out in this statute.” *First Knox Nat’l Bank v. Patricia Hoffman-Wyatt, Inc.*, No. 92-CA-09, 1992 Ohio App. LEXIS 5536, at *2 (Ohio Ct. App. Oct. 22, 1992).⁴

In *Gunton Corp. v. Thomas G. Banks*, No. 01AP-988, 2002 Ohio 2873, 2002 Ohio App. LEXIS 2806 (Ohio Ct. App. June 6, 2002),⁵ the appellate court examined two cognovit notes to determine whether the required warning language appeared “ ‘in such type size or distinctive marking that it appears more clearly and conspicuously than anything else on the document.’ ” *Id.* at P11, 2002 Ohio App. LEXIS at *9 (quoting Ohio Rev. Code Ann. § 2323.13(D)). In concluding that the provisions of the note complied with the clear and conspicuous provision of section 2313.13(D), the court stated: “The type face used in the cognovit warning language in the two promissory notes is larger than anything else on the note except the title, ‘PROMISSORY NOTE.’ However, the warning is more conspicuous and clear because it is

4. Because *First-Knox* was decided before 1 May 2002 in the Fifth Appellate District of Ohio, and because the Ohio Official Reports did not publish *First-Knox*, the opinion is persuasive, but not binding, authority upon courts in Hancock County, which is in the Third Appellate District, where the present case originated. See *Watson v. Neff*, No. 08CA12, 2009 Ohio 2062, P16, 2009 Ohio App. LEXIS 1794, *7-8 (Ohio Ct. App. Apr. 29, 2009) (explaining that an unpublished Ohio opinion that was decided before 1 May 2002, when the Ohio Supreme Court Rules For The Reporting of Opinions was modified, constituted persuasive, but not binding, authority upon the courts in the judicial district in which it was decided) (citing former S. Ct. Rep. Op. Rule 2(G)(1)-(2)).

5. Although the opinion in *Gunton* is not published in an official West report, its publication in the Ohio Official Reports after 1 May 2002 allows it to be cited as legal authority and weighted as deemed appropriate. See Ohio S. Ct. Rep. Op. Rule 4:

(A) Notwithstanding the prior versions of these rules, designations of, and distinctions between, “controlling” and “persuasive” opinions of the courts of appeals based merely upon whether they have been published in the Ohio Official Reports are abolished.

(B) All court of appeals opinions issued after the effective date of these rules[, 1 May 2002,] may be cited as legal authority and weighted as deemed appropriate by the courts.

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printed in bold type.” *Id.* The appellate court thus concluded that the trial court was not barred from enforcing the notes. *Id.*

Likewise, in *Fogg v. Friesner*, 562 N.E.2d 937 (Ohio Ct. App. 1988), the appellate court concluded that the warning language in the appellee’s cognovit note complied with section 2323.13(D) because “[t]he required warning appears in capital letters and is single spaced. It is in a different form than the rest of the note and is clearly noticeable.” *Id.* at 939.

On the other hand, the court in *First-Knox* concluded that the warning language contained in the note at issue did not appear “more clearly and conspicuously than anything else on the document[,]” 1992 Ohio App. LEXIS 5536 at *2 (citation omitted), and, thus, failed to “meet[] the specific objective criteria that the legislature chose to spell out in this statute.” *Id.* In reaching this conclusion, the appellate court explained:

The most prominent, conspicuous, and distinctive marking on the note is the name of the bank located in the upper left-hand corner of the note. Seven other topical headings are printed in type that is equally as prominent as the confession of judgment. Furthermore, the language “SUBJECT TO THE TERMS AND PROVISIONS OF THE LOAN AGREEMENT DATED JANUARY 19, 1989” appears in the very middle of the note set off above and below by triple-spaced margins. It too, appears more clearly and conspicuously than the confession of judgment.

Id. at *2-3. Accordingly, the trial court’s judgment allowing the creditor to enforce the cognovit note against the debtor was reversed.

In the present case, the warning language in the Note appears directly below the space provided for Defendant’s signature, as mandated by Ohio Rev. Code Ann. § 2323.13(D). The warning language appears in all-capital letters. However, the Note’s page headings and the introductory phrases “FOR VALUE RECEIVED” and “IN WITNESS WHEREOF” are also written in all-capital letters in the same font size as the warning language and, thus, are equally conspicuous. Furthermore, the most prominent, conspicuous, and distinctive markings on the Note are the title and the eight subject headings which not only appear in all-capital letters of the same font size as the warning, but are underlined as well. Thus, the title and the subject headings appear more clearly and conspicuously than the warning language.

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As in *First-Knox*, the warning language in the Note is not “in such type size or distinctive marking that it appears more clearly and conspicuously than anything else on the document.” Ohio Rev. Code Ann. § 2323.13(D). Because Ohio courts only enforce cognovit agreements that strictly comply with Ohio Rev. Code Ann. § 2323.13, and because the warrant of attorney fails to meet the objective criteria of section 2323.13(D), the Ohio court was without subject matter jurisdiction to enter the Ohio judgment. As a court of this state may not enforce a judgment entered by a court of a foreign state that lacked subject matter jurisdiction to enter the judgment, the trial court erred in denying Defendant relief from the Ohio judgment.

Relying on *Medina Supply Co., Inc. v. Corrado*, 689 N.E.2d 600 (Ohio Ct. App. 1996), the dissent concludes that “[t]he cognovit warning on the note in question was the most conspicuous portion of the document, and complies with the Ohio statute.” In *Medina*, the note at issue was one page in length and the warning language appeared in all-capital letters directly above the space provided for defendant’s signature. Defendant argued that the title of the note, “‘NOTE,’” was more conspicuous than the warning language because the title was underlined as well as in all-capital letters. The court found defendant’s argument “to be specious” because “a four-letter title is an inadequate basis for comparison to a paragraph.” *Id.* at 851. The court reasoned that “[t]he document itself is only one page long” and “the warning is the only paragraph set off entirely in capital letters.” *Id.* Thus, the court concluded that the “type, location, and proportion [of the] the warning satisfies the law.” *Id.*

In this case, the warning language appears in all-capital letters directly below the space provided for Defendant’s signature. As in *Medina*, the placement of the warning language here complies with Ohio Rev. Code Ann. § 2323.13(D) that the warning language appear “directly above or below the space or spaces provided for the signatures of the makers, or other person authorizing the confession.” However, unlike a comparison between the four-letter title, “‘NOTE,’” and the warning paragraph which covered almost a third of the page on the single-paged document at issue in *Medina*, in this case, the Note spans three pages, and the page headings “DEMAND COGNOVIT PROMISSORY NOTE = PAGE 2” and “DEMAND COGNOVIT PROMISSORY NOTE = PAGE 3” and the introductory phrases “FOR VALUE RECEIVED” and “IN WITNESS WHEREOF” are also written in all-capital letters in the same font size and type as the warning language. Furthermore, the title and the eight subject headings, many of

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which contain multiple words and one of which spans two lines, appear in all-capital letters of the same font size as the warning, are set off above and below by double-spaced margins, and are underlined as well. As a result, the title and the subject headings appear more clearly and conspicuously than the warning language. Thus, unlike in *Medina*, and contrary to the dissent's assertion that the "only difference" between the Note here and the note in *Medina* is the *placement* of the warning language, the statutory requirement that the warning appear "in such type size or distinctive marking that it appears more clearly and conspicuously than anything else on the document" is not met in this case.

Accordingly, the order of the trial court is

REVERSED.

Judge HUNTER, JR. concurs.

Judge STEELMAN dissents with a separate opinion.

APPENDIX

IN THE COURT OF APPEALS

IN RE GARDNER v. TALLMADGE

[207 N.C. App. 282 (2010)]

DEMAND COGNOVIT PROMISSORY NOTE

\$200,000.00

Findlay, Ohio

Maturity Date: Upon Demand

Date of Note:
March 25th, 2004

FOR VALUE RECEIVED, the undersigned, Tallmadge Holding Co., LLC., a North Carolina Limited Liability Company and Bruce Tallmadge (referred to in this Note as the "Borrowers"), promise to pay to the order of Michael J. Gardner (referred to in this Note as "Lender") at 2151 Industrial Drive, Findlay, Ohio 45840, or at such other place as Lender may designate in writing from time to time, in legal tender of the United States, the principal sum of Two Hundred Thousand Dollars (\$200,000.00), together with interest on the unpaid principal balance thereof from the date of this Note at the rate and payable in the manner hereinafter provided.

RATE OF INTEREST AND MANNER OF PAYMENT

Interest on the principal balance of this Note from time to time outstanding shall be charged and owing at an annual rate of Three Hundred Thirty-seven and one-half per cent (337.5%) per annum. Interest in the amount of \$56,250.00 shall be payable monthly in arrears on the first day of each calendar month, commencing **June 1 (BJT)**, 2004 and continuing on the first day of each month thereafter.

Principal shall be due and payable upon demand; provided however, notwithstanding any other provision in this Note, the unpaid principal balance and all accrued and unpaid interest shall be due and payable on or before April 1, 2005.

PREPAYMENT

This Note may be prepaid in whole or in part without payment of any prepayment premium

SECURITY

This Note is unsecured.

DEFAULT

The entire unpaid principal balance of this Note and all accrued and accruing interest thereon shall become immediately due and payable by Borrowers to Lender without notice at the option of Lender upon any default in the payment of any amount when due under this Note. In addition, Borrowers shall pay Lender's costs and attorney fees incurred in collecting or enforcing payment, whether suit be brought or not. Any failure of Lender to exercise such option to accelerate shall not constitute a waiver of

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the right to exercise such option to accelerate at any future time.

Acceptance by Lender of any payment in an amount less than the amount due shall be deemed an acceptance on account only, and the failure to pay the entire amount then due shall be and continue to be an event of default. At any time thereafter and until the entire amount then due has been paid, Lender shall be entitled to exercise all rights conferred upon it in this Note upon the occurrence of a default.

WAIVER

Borrowers, for themselves and their respective heirs, successors and assigns, expressly waive presentment, demand, protest, notice of dishonor, notice of nonpayment, notice of acceleration, notice of maturity, and presentment for the purpose of accelerating maturity.

JOINT AND SEVERAL OBLIGATION OF BORROWERS

This Note shall be the joint and several obligation of Tallmadge Holding Co., LLC, a North Carolina Limited Liability Company, and Bruce Tallmadge, and of all sureties, guarantors and endorsers, and shall be binding upon them and their respective heirs, administrators, executors, successors and assigns.

CONFESSION OF JUDGMENT

Borrowers do each hereby authorize any attorney at law to appear for Borrowers (or either one of the Borrowers) in an action on this Note at any time after the same becomes due, as herein provided, whether by acceleration or otherwise, in any Court of record in or of the State of Ohio or in any other state or territory of the United States, and to waive the issuing and service of process against Borrowers (or either one of the Borrowers), to admit the maturity of this Note by acceleration or otherwise, and to confess judgment in favor of the legal holder of this Note against Borrowers (or either one of the Borrowers) for the amount then due, with interest, late charge(s) and default interest all at the rate(s) herein mentioned, and attorney fees and costs of suit, and to waive and release all errors in said proceedings and judgment and all right to appeal from the judgment rendered.

**GOVERNING LAW, SUCCESSORS AND
ASSIGNS AND MISCELLANEOUS**

This Note is made in the State of Ohio and shall be governed and construed in accordance with its laws. If any provision(s) of this Note are in conflict with any statute or applicable rule of law, or are otherwise unenforceable for any reason whatsoever, such provision(s) shall be deemed null and void to the extent of such conflict or unenforceability but shall be deemed separate from and shall not invalidate any other

IN THE COURT OF APPEALS

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[207 N.C. App. 282 (2010)]

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provision of this Note. The rights and remedies provided to Lender in this Note are cumulative and the use of any one right or remedy shall not preclude or waive its ability to use any or all other rights and remedies Lender may have at law or in equity. In this Note, the singular and plural are interchangeable and words of gender shall include all genders.

This Note shall, in accordance with its terms, be binding upon Borrowers, and their respective heirs, administrators, executors, successors and assigns, and shall inure to the benefit of Lender, his heirs, administrators, executors and assigns. Tallmadge Holding Co., LLC represents that the execution of this Note has been authorized by the governing documents of said limited liability company. The paragraph headings provided in this Note are for convenience only.

IN WITNESS WHEREOF, Borrowers, Tallmadge Holding Co., LLC, a North Carolina Limited Liability Company, and Bruce Tallmadge, have executed and delivered this Note to Lender on the ___ day of March, 2004.

TALLMADGE HOLDING CO., LLC
A North Carolina Limited Liability Co.

By: 

Bruce Tallmadge
Its Managing Member


Bruce Tallmadge, individually

"Borrowers"

WARNING--BY SIGNING THIS PAPER YOU GIVE UP YOUR RIGHT TO NOTICE AND COURT TRIAL. IF YOU DO NOT PAY ON TIME, A COURT JUDGMENT MAY BE TAKEN AGAINST YOU WITHOUT YOUR PRIOR KNOWLEDGE AND THE POWERS OF A COURT CAN BE USED TO COLLECT FROM YOU REGARDLESS OF ANY CLAIMS YOU MAY HAVE AGAINST THE CREDITOR WHETHER FOR RETURNED GOODS, FAULTY GOODS, FAILURE ON HIS PART TO COMPLY WITH THE AGREEMENT, OR ANY OTHER CAUSE.

IN RE GARDNER v. TALLMADGE

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STEELMAN, Judge dissenting.

While this case presents a number of troubling issues, the conspicuous nature of the cognovit warning is not one of them. I must respectfully dissent.

A copy of the actual note in question, containing the cognovit warning is attached to the majority opinion. The warning appears in all capital letters below the signature lines. It is clearly the most conspicuous portion of the document. Because of its placement immediately below the signature lines, it is especially conspicuous, because the borrower would have to actually see that language in order to execute the document. I would hold that the cognovit warning on page three of the Demand Cognovit Promissory Note met the requirements of Ohio Revised Code Annotated § 2323.13(D) (2010) that it appear:

directly above or below the space or spaces provided for the signature of the makers, or other person authorizing the confession, in such type size or distinctive marking that it appears more clearly and conspicuously than anything else on the document

This case is controlled by *Medina Supply Company, Inc. v. Corrado*, 689 N.E.2d 600 (Ohio Ct. App. 1996), which is a published case. *Medina* holds:

In the case at bar, the note signed by defendants contained, word for word, the statutorily mandated warning contained in [Ohio Revised Code] 2323.13(D). This warning appeared in all capital letters immediately above the signatures of defendants. Defendants argue that this warning is insufficient because it does not appear more clearly and conspicuously than anything else on the document. Specially, defendants point to the fact that the title of the note, 'NOTE,' is in capitals and also underlined, whereas the warning is merely in capitals with no underlining. We find this argument to be specious. First, a four-letter title is an inadequate basis for comparison to a paragraph. An objective review of the cognovit note shows the warning prominently displayed immediately above the signatures. The document itself is only one page long. Most important, the warning is the only paragraph set off entirely in capital letters. Thus, in type, location, and proportion, the warning satisfies the law. The statute does not require the warning be a flashing neon light. Accordingly, we find that the cognovit note complied with [Ohio Revised Code] 2323.13.

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Id. at 603. The only notable difference between the cognovit warning in *Medina* and the one in the instant case is that in *Medina* the warning appeared immediately above the signature lines, rather than immediately below the signature lines. Since Ohio Revised Code Annotated § 2323.13 provides that the warning can either be “directly above or below” the signature lines, this is not a legally significant difference. The cognovit warning on the note in question was the most conspicuous portion of the document, and complies with the Ohio statute.

The fact that the note in the instant case is three pages long and each of the section headings is capitalized and underlined does not make this note significantly different from that in *Medina*. As noted in *Medina*, the most important fact is that “the warning is the only paragraph set off entirely in capital letters.” 689 N.E.2d at 603. This is present in the note in the instant case, just as it was in *Medina*. I would hold that the cognovit warning on the note in question complies with the Ohio Statute.

CLINTON W. LUNSFORD, AND MARY ANN LUNSFORD, AS CO-ADMINISTRATORS OF THE ESTATES OF LINSAY ERIN LUNSFORD AND MAGGIE ROSE LUNSFORD, PLAINTIFFS v. LORI RENN, ADMINISTRATRIX OF THE ESTATE OF GUY C. AYSCUE, DECEASED; MICHAEL LEWIS DUNLAP, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS AN OFFICER OF THE TOWN OF FRANKLINTON POLICE DEPARTMENT; JOHN GREEN, IN HIS OFFICIAL CAPACITY AS AN OFFICER OF THE TOWN OF FRANKLINTON POLICE DEPARTMENT; RAY GILLIAM, IN HIS OFFICIAL CAPACITY AS CHIEF OF THE TOWN OF FRANKLINTON POLICE DEPARTMENT; AND THE TOWN OF FRANKLINTON, DEFENDANTS

No. COA09-1592

(Filed 5 October 2010)

1. Appeal and Error— interlocutory order—partial summary judgment—certified by trial judge

The Court of Appeals had jurisdiction to review a partial summary judgment in a wrongful death action arising from an automobile accident where the only remaining claim was against an estate and the trial court certified the summary judgment order pursuant to N.C.G.S. § 1A-1, Rule 54(b).

2. Police Officers— high-speed chase—wrongful death action—no gross negligence

The trial court properly granted summary judgment for an officer in his official capacity in a wrongful death action that

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arose from a high-speed chase where the evidence did not show that the officer acted in a wanton or reckless manner. Plaintiffs' evidence on gross negligence boiled down to the contention that the officer was reckless in continuing to pursue a driver whose dangerous driving began before the pursuit and who was a danger to the community whether pursued by police or not. Such a holding would all but preclude an officer's ability to pursue a suspect driving recklessly and attempting to evade police.

3. Police Officers— high-speed chase—no gross negligence— police and town officials—not liable

Summary judgment was properly granted for a police chief, a lieutenant, and the town in a wrongful death action that arose from a high-speed chase where there was no gross negligence in the chase itself.

4. Cities and Towns— high-speed chase—wrongful death— town's insurance policy—not ambiguous

Summary judgment was properly entered for a town and its police officers in a wrongful death claim arising from a high-speed chase where there was no ambiguity about the Town's insurance policy, despite plaintiffs' contentions.

5. Immunity— police officers—high-speed chase—public official immunity

A police officer was entitled to public official immunity in his individual capacity in a wrongful death action arising from a high-speed chase. Plaintiffs did not forecast evidence demonstrating that the officer acted maliciously, wantonly, or recklessly in his pursuit of a driver who was driving recklessly when the pursuit began.

Appeal by plaintiffs from order entered 8 June 2009 by Judge Shannon R. Joseph in Granville County Superior Court. Heard in the Court of Appeals 12 May 2010.

Edmundson & Burnette, L.L.P., by James T. Duckworth, III, for plaintiff-appellants.

Frazier, Hill & Fury, R.L.L.P., by Torin L. Fury, for defendant-appellees.

HUNTER, JR., Robert N., Judge.

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Clinton W. and Mary Ann Lunsford, as administrators of their daughters' estates (collectively "plaintiffs"), filed a wrongful death action against Officer Michael Dunlap, Lieutenant John Green, Police Chief Ray Gilliam, the Town of Franklinton, and the estate of Guy C. Ayscue ("Ayscue") after Linsay Erin and Maggie Rose Lunsford were killed in a head-on collision. At the time of the collision, Ayscue was attempting to evade arrest in his car, and Officer Dunlap, along with other law enforcement officers, was pursuing Ayscue in order to apprehend him.

The trial court granted summary judgment as to all defendants except Ayscue's estate¹ and denied all of plaintiffs' claims for gross negligence. As a result, the only claim remaining for trial is plaintiffs' claim against Ayscue's estate for negligence. After review, we agree with the trial court that there is no genuine issue of material fact on the issue of whether any defendants were grossly negligent, and we agree that defendants were entitled to judgment as a matter of law. Accordingly, we affirm the trial court's order.

I. BACKGROUND

Plaintiffs forecasted the following evidence. On 1 December 2007, at approximately 2:30 p.m., Officer Dunlap of the Franklinton Police Department was flagged down by a clerk at Snacker's Convenience Store located at the intersection of Main Street and N.C. Hwy. 56 in Franklinton, North Carolina. The clerk brought the officer's attention to a car going through the adjacent intersection, and Officer Dunlap observed a gray 1988 Pontiac driving on the wrong side of the road as it went through a red light without stopping or slowing. After observing these misdemeanor offenses, Officer Dunlap decided to initiate a traffic stop, and he pulled out of the parking lot as he activated his blue lights on his K-9 Unit patrol car. At 2:33 p.m., Officer Dunlap notified Franklin County Communications ("Dispatch") that he was attempting to catch up to the Pontiac, and he provided the license plate number of the car to Dispatch. The K-9 Unit driven by Officer Dunlap lacked a top light rack, but it was fully marked as a Town of Franklinton Police vehicle; and it was equipped with an L.E.D. interior dash blue light bar, two red L.E.D. grill lights, clear corner strobe lights, "wig-wags" in the high beam headlights, and two L.E.D. blue lights on the side mirrors.

1. Officer Michael Dunlap, Lieutenant John Green, Police Chief Ray Gilliam, and the Town of Franklinton will be denominated collectively as "defendants" for the remainder of this opinion.

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The chase began within the town limits of Franklinton, and as the cars traveled west on N.C. Hwy. 56, they passed a residential neighborhood, a business, a church, and a shopping mall. Shortly after Officer Dunlap began pursuit, Lieutenant John Green of the Franklinton Police Department began following at a distance in his marked SUV to monitor radio traffic. At 2:35 p.m., Officer Dunlap advised Dispatch that he was chasing a white male driver, and the dispatcher responded that the same description fit the registered owner of the Pontiac at an address in Henderson, North Carolina. Throughout the chase, Officer Dunlap maintained radio contact with the dispatcher and Lieutenant Green.

The road contour of N.C. Hwy. 56 from Franklinton city limits to the Town of Wilton, in Granville County, was “very hilly” and “up and down,” according to State Trooper D.J. Sinnema. Near the county line between Franklin and Granville Counties, Trooper Sinnema observed Officer Dunlap’s pursuit of the Pontiac. In his deposition, Trooper Sinnema stated that he watched Officer Dunlap and the Pontiac crest a “bad hill” going “very fast.” Trooper Sinnema’s visual estimate of the chase’s speed was between 80 and 90 m.p.h. Trooper Sinnema caught only a glance of Officer Dunlap and the Pontiac as they passed him, but he estimated that Officer Dunlap was following only one car length behind the Pontiac. Shortly after the chase passed by Trooper Sinnema, two cars were run off the road by the Pontiac.

The Pontiac ran several more cars off the road before entering the Town of Creedmoor. After the Pontiac entered the city limits, Officer Ted Frazier of the Creedmoor Police Department joined the chase. As Officer Frazier was heading east on N.C. Hwy. 56, the Pontiac and Officer Dunlap’s vehicle passed westbound traffic by entering the eastbound lane. Officer Frazier had to pull his vehicle to the side of the road to avoid being hit, and after the chase passed him, he turned around to follow as well. Officer Frazier testified in his deposition that traffic at the time was “very heavy” due to a Christmas parade which took place earlier in the day. As a result of the increased volume of cars on the road, the Pontiac, as well as Officer Dunlap’s vehicle, were weaving in and out of the westbound lane, the left turn lane, and the eastbound lane. Officer Frazier visually estimated the speed of the chase to be between 90 and 100 m.p.h., and his speed radar registered the speed of the vehicles at 103 m.p.h. Officer Frazier followed the chase as it “zigzagged” in and out of the heavy traffic, and he advised a dispatcher that “if the vehicles did not slow down, they would kill someone.”

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Trooper Harold Councilman encountered the chase in Creedmoor at the intersection of N.C. Hwy. 56 and N.C. Hwy. 50 (Main St.) as he was heading east on N.C. Hwy. 56. After Trooper Councilman turned around to head west on N.C. Hwy. 56 to assist, he lost sight of the chase. Trooper Councilman eventually discovered that the chase had turned north onto N.C. Hwy. 15. To catch up to the Pontiac and Officer Dunlap, Trooper Councilman drove approximately 120 m.p.h., and he estimated the speed of the chase during his pursuit to be about 90 m.p.h. Trooper Councilman obtained visual contact with the chase about a half a mile before the collision eventually occurred. This last portion of road in the chase contained three hills, each of which prevented a driver going north from observing southbound traffic until the crest of the hill.

Near the top of the third hill, the Pontiac “jerked” left of the centerline to pass another vehicle headed north, and Officer Dunlap followed the Pontiac across the centerline, continuing to chase. A split second after the Pontiac crossed the centerline, Trooper Councilman watched it collide head-on with another car coming south. Officer Dunlap swerved hard to the right to avoid also being part of the collision with the Pontiac and eventually came to rest in the ditch 297 feet from the point of leaving the roadway. Lindsay Lunsford, Maggie Lunsford, and the driver of the Pontiac died in the collision. The identification of the driver of the Pontiac was later confirmed to be the registered owner of the car, Ayscue.

Plaintiffs filed a wrongful death action on 14 May 2008 against defendants and Ayscue’s estate. The complaint contained causes of action against Officer Dunlap in his official capacity, Lieutenant Green in his official capacity, Ray Gilliam in his official capacity, and the Town of Franklinton. On 15 January 2009, plaintiffs moved to amend their complaint to implead Officer Dunlap individually as well as in his official capacity. On 9 March 2009, the Honorable Henry W. Wright entered an order granting plaintiffs’ motion to implead Officer Dunlap individually. On 1 May 2009, defendants filed a motion for summary judgment, which was granted on 8 June 2009 by the Honorable Shannon R. Joseph. On 10 June 2009, the trial court, pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure, certified the summary judgment order as a final judgment. Plaintiffs timely filed notice of appeal to this Court on 30 June 2009.

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II. ANALYSIS

A. Jurisdiction and Standard of Review

[1] We note that this appeal is interlocutory given that plaintiffs' cause of action against Ayscue's estate is still pending in the trial court. *Embler v. Embler*, 143 N.C. App. 162, 164, 545 S.E.2d 259, 261 (2001) (orders made during the pendency of an action not disposing of the entire controversy are interlocutory). "Generally, there is no immediate right to appeal from interlocutory orders and judgments." *Goldston v. American Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, where the trial court certifies an interlocutory order under N.C.R. Civ. P. 54(b) (2010), jurisdiction in this Court is proper. *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) ("When the trial court certifies its order for immediate appeal under Rule 54(b), appellate review is mandatory."); see *Oestreicher v. Stores*, 290 N.C. 118, 127, 225 S.E.2d 797, 803 (1976) (the trial court is a "dispatcher" and determines "the appropriate time when each 'final decision' upon 'one or more but less than all' of the claims in a multiple claims action is ready for appeal") (citation omitted); *Trull v. Central Carolina Bank*, 117 N.C. App. 220, 450 S.E.2d 542 (1994) (jurisdiction is proper where summary judgment is granted to one defendant but fewer than all defendants on all of the plaintiff's claims), *aff'd in part and disc. review improvidently allowed in part*, 347 N.C. 262, 490 S.E.2d 238 (1997).

In this case, summary judgment was granted in favor of defendants, and the trial court certified the summary judgment order pursuant to N.C.R. Civ. P. 54(b) (2010). Since the only claim remaining is against Ayscue's estate, it is apparent that the trial court's order is "a final judgment as to one . . . but fewer than all of . . . [the] parties," and we agree that there is "no just reason for delay." N.C.R. Civ. P. 54(b). Jurisdiction in this Court is accordingly proper under Rule 54(b).

"We review orders granting summary judgment *de novo*." *Self v. Yelton*, 201 N.C. App. 653, 658, 688 S.E.2d 34, 37 (2010). Under *de novo* review, this Court " 'considers the matter anew and freely substitutes its own judgment for that of the [trial court].'" *Stacy v. Merrill*, 191 N.C. App. 131, 134, 664 S.E.2d 565, 567 (2008) (citation omitted). Summary judgment is proper when, viewed in the light most favorable to the nonmovant, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.R. Civ. P. 56(c) (2010); see *S.B. Simmons Landscaping & Excavating, Inc. v.*

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Boggs, 192 N.C. App. 155, 163-64, 665 S.E.2d 147, 152 (2008). The burden rests initially on the moving party to show that there exists no genuine issue of material fact. *Self*, 201 N.C. App. at 658, 688 S.E.2d at 38. “If a moving party shows that no genuine issue of material fact exists for trial, the burden shifts to the nonmovant to adduce specific facts establishing a triable issue.” *Id.*

B. Gross Negligence²

[2] Plaintiffs argue that the evidence, viewed in the light most favorable to them, shows that there is a genuine issue of material fact as to whether defendants were grossly negligent in pursuing Ayscue. Applying the factors outlined in *Norris v. Zambito*, 135 N.C. App. 288, 520 S.E.2d 113 (1999) and *Bullins v. Schmidt*, 322 N.C. 580, 369 S.E.2d 601 (1988), plaintiffs contend that the combination of the high vehicle speeds, hilly road terrain, traffic concentration, Officer Dunlap’s close following distance, population density, and duration of the chase create an issue for trial on their claim for gross negligence. We do not agree.

“Our Supreme Court has held that ‘in any civil action resulting from the vehicular pursuit of a law violator, the gross negligence standard applies in determining the officer’s liability.’” *Eckard v. Smith*, 166 N.C. App. 312, 318, 603 S.E.2d 134, 139 (2004) (citation omitted), *aff’d*, 360 N.C. 51, 619 S.E.2d 503 (2005). Gross negligence has been defined as “wanton conduct done with conscious or reckless disregard for the rights and safety of others.” *Bullins*, 322 N.C. at 583, 369 S.E.2d at 603, *abrogated on other grounds*, *Parish v. Hill*, 350 N.C. 231, 513 S.E.2d 547 (1999). “‘An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others.’” *Yancey v. Lea*, 354 N.C. 48, 52, 550 S.E.2d 155, 157 (2001) (citation omitted).

Our “Courts have discussed several factors as relevant to the issue of whether the conduct of a law enforcement officer engaged in pursuit of a fleeing suspect meets the grossly negligent standard.” *Norris*, 135 N.C. App. at 294, 520 S.E.2d at 117. These factors, although not dispositive standing alone, include: (1) the reason for the pursuit; (2) the probability of injury to the public due to the offi-

2. In addition to the addressed issues, plaintiffs initially assign error to the trial court’s admission of Exhibit 4 of the affidavit of defendants’ expert Jon Blum. Exhibit 4 is a prepared video of the pursuit route. Plaintiffs allege the video inaccurately reflects the pursuit route at the time of the chase and is, therefore, irrelevant. However, plaintiffs do not argue this original assignment of error in brief, and in accordance with N.C.R. App. P. 28 (2010), it is deemed abandoned.

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cer's decision to begin and maintain pursuit; and (3) the officer's conduct during the pursuit.³ *Id.* at 294-95, 520 S.E.2d at 117.

Under the first factor, when examining the reason for a pursuit, we apply the following:

If the officer was attempting to apprehend someone suspected of violating the law, the police officer would fall squarely within the standard of care established by the Supreme Court's construction of G.S. § 20-145. . . . It is also relevant to consider whether the suspect was known to police and could be arrested through means other than apprehension via a high speed chase; . . . or whether the fleeing suspect presented a danger to the public that could only be abated by immediate pursuit.

Id. at 294, 520 S.E.2d at 117 (citations omitted). Under the second factor regarding the public's safety as a result of an officer's decision to begin and continue pursuit, we bear the following considerations in mind:

[T]he time of day or night when the pursuit occurred, the location of the pursuit (a highway, residential neighborhood, rural area, or within the city limits), population of the area, type of terrain (hilly or curvy roads), traffic conditions, presence of other vehicles on the road, posted speed limits, road conditions, weather conditions, duration of pursuit, and length of pursuit[.]

Id. at 294-95, 520 S.E.2d at 117 (citations omitted). Under the third factor as to the officer's conduct during the chase, we observe

whether the officer used emergency lights, sirens and headlights, collided with any person, vehicle or object, kept his or her vehicle under control, followed relevant departmental policies regarding chases, violated generally accepted standards for police pursuits, and what the officer's speed was during the pursuit.

Id. at 295, 520 S.E.2d at 117.

In this appeal, plaintiffs have expounded in detail how the facts surrounding this tragedy support a question of gross negligence. Viewing the evidence in the light most favorable to plaintiffs, the record shows that, at times, the chase reached tremendous speeds in

3. Plaintiffs claim that our Supreme Court announced a "Rules of the Road" factor in *Bullins*. However, a reading of *Bullins* reveals no such new factor, and to the extent the adherence to traffic rules is discussed in *Bullins*, we address such actions herein as part of the third factor.

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the midst of heavy traffic. Ayscue ran several cars off the road while being pursued, and the speeds reached during the chase were dangerous due to the many curves and hills encountered—particularly near the point of the collision. The chase lasted about fourteen minutes, and covered approximately 18.2 miles. Several portions of those miles included densely populated neighborhoods and commercial sectors of Franklinton and Creedmoor. Officer Dunlap, at some points during his pursuit, followed very close to Ayscue’s vehicle. Moreover, Officer Dunlap violated the Franklinton Police Department policy banning high speed pursuits of fleeing suspects, because for most of the chase, the speed of the vehicles was more than twenty miles an hour over the posted speed limit. Officer Dunlap crossed the centerline on several occasions, and for at least several portions of the pursuit, Officer Dunlap followed very close to Ayscue’s vehicle.

Even though this evidence ostensibly seems to satisfy many of the considerations this Court examines on appeal in these cases, it fails to raise a genuine issue that Officer Dunlap acted with a reckless indifference to the safety of the public—the lowest threshold for wanton conduct. Plaintiffs do not dispute that approximately a half hour before Officer Dunlap began his pursuit, David Watson, a Franklinton resident, called 911 due to Ayscue’s erratic and dangerous driving within the town limits of Franklinton. Ayscue was running red lights, driving at high speeds, swerving across the centerline, passing other vehicles in dangerous circumstances, rapidly accelerating, squealing his tires, and skidding as he maneuvered turns. Though Officer Dunlap was not responding to Mr. Watson’s 911 call when he began his pursuit, clearly Ayscue was driving in a menacing manner prior to his involvement. Ayscue’s driving was obviously a concern for the clerk at Snacker’s Convenience Store, who took the time to alert Officer Dunlap to Ayscue’s reckless indifference to the traffic laws.

Ayscue’s behavior before being pursued underscores the reason we give great deference to a law enforcement officer’s decision to initiate and maintain pursuit of a suspect. Even plaintiffs’ evidence supports the conclusion that, very early in the chase, Ayscue was driving in a very dangerous manner—as he had been for at least half an hour before Ayscue encountered Officer Dunlap. Officer Dunlap observed right away that Ayscue was a risk to himself and the public. Officer Dunlap knew that a white male was driving the car, but he did not discover the identity of the driver until Ayscue had already brought the chase to its tragic finale. In light of the entire record, even if Officer Dunlap had not initiated pursuit, it is not entirely improbable that the same result could have occurred.

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Plaintiffs' evidence highlights the dangers encountered throughout the pursuit, but it does not show that Officer Dunlap acted in a manner that was wanton or reckless. Ayscue's culpability aside, the evidence offered by plaintiffs as to the above factors on gross negligence boils down to one primary contention: Officer Dunlap was reckless by continuing to pursue Ayscue when Ayscue drove in a dangerous manner. We decline to adopt this principle. When drivers are driving in a dangerous manner, they are a danger to the community whether being pursued by police or not. To hold that there is a genuine issue that Officer Dunlap was reckless in these circumstances would all but preclude an officer's ability to pursue a suspect driving recklessly and attempting to evade police, because for an officer to chase such an individual would open the officer to potential liability. Officer Dunlap was merely attempting to mitigate an already precarious situation by getting Ayscue off the road. Ayscue refused to comply. Without at least some evidence showing that Officer Dunlap was reckless in trying to get Ayscue to pull off the road, plaintiffs cannot show that Officer Dunlap's conduct was grossly negligent.

This conclusion has plenary support from the existing case law in this State. *See Bullins*, 322 N.C. 580, 369 S.E.2d 601 (no gross negligence where officer conducted a pursuit which lasted 14 minutes, spanned 18 miles, reached speeds of 100 m.p.h., and ended in a fatal head-on collision); *Parish*, 350 N.C. 231, 513 S.E.2d 547 (no gross negligence where officer reached speeds of 130 m.p.h. during pursuit which took place at 2:00 a.m.); *Young v. Woodall*, 343 N.C. 459, 463, 471 S.E.2d 357, 360 (1996) (no gross negligence when officer did not activate his blue lights/siren, traveled at high speeds through an intersection, and did not notify his superiors of his intention to pursue, all of which violated procedure); *Bray v. N.C. Dep't of Crime Control and Pub. Safety*, 151 N.C. App. 281, 284, 564 S.E.2d 910, 912-13 (2002) (no gross negligence where state trooper collided with an oncoming vehicle after losing control due to excessive speed of pursuit). Thus, since plaintiffs have failed to show that there is a genuine issue of material fact that Officer Dunlap was grossly negligent, the trial court properly granted summary judgment to Officer Dunlap in his official capacity.

[3] As to the gross negligence of Officer Dunlap's superiors, Lieutenant Green and Chief Gilliam, plaintiffs appear to argue only that these officers should have halted the pursuit at some point prior to the collision. However, because we decline to find gross negligence in the pursuit itself as discussed above, we similarly decline to hold that Lieutenant Green and Chief Gilliam were grossly negligent. Furthermore, since the

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claim against the Town of Franklinton is based on the doctrine of *respondeat superior*, summary judgment in favor of the town was proper given that no officers were grossly negligent in executing their duties. This assignment of error is overruled.⁴

C. Sovereign Immunity

[4] Plaintiffs contend that the trial court erred by granting summary judgment to defendants on the grounds of sovereign immunity. Plaintiffs allege that defendants are not covered by the doctrine of sovereign immunity due to ambiguities in the Town of Franklinton's insurance policy. We do not agree.

"As a general rule, the doctrine of governmental, or sovereign immunity bars action against, *inter alia*, the state, its counties, and its public officials sued in their official capacity." *Herring v. Winston-Salem/Forsyth County Bd. of Educ.*, 137 N.C. App. 680, 683, 529 S.E.2d 458, 461 (2000) (citation omitted). The doctrine applies when the entity is being sued for the performance of a governmental function. *Id.* "[S]uits against public officials are barred by the doctrine of governmental immunity where the official is performing a governmental function, such as providing police services." *Parker v. Hyatt*, 196 N.C. App. 489, 493, 675 S.E.2d 109, 111 (2009) (citation omitted). A town or municipality may waive sovereign immunity through the purchase of liability insurance. *Satorre v. New Hanover Cty. Bd. of Comm'rs*, 165 N.C. App. 173, 176, 598 S.E.2d 142, 144 (2004). However, "[i]mmunity is waived only to the extent that the [municipality] is indemnified by the insurance contract from liability for the acts alleged." *Id.* (quoting *Combs v. Town of Belhaven*, 106 N.C. App. 71, 73, 415 S.E.2d 91, 92 (1992)). "A governmental entity does not waive sovereign immunity if the action brought against them is excluded from coverage under their insurance policy." *Patrick v. Wake Cty. Dep't of Human Servs.*, 188 N.C. App. 592, 596, 655 S.E.2d 920, 923 (2008).

The Town of Franklinton's insurance policy states in relevant part:

H. Governmental Immunity

Because you are a public institution, you may be entitled to governmental immunity. This policy does not constitute a waiver of governmental immunity to which you are entitled.

4. Because we conclude that there was no gross negligence on these grounds, we decline to address plaintiffs' further arguments that: (1) the trial court erred in granting summary judgment to defendants on the grounds of superceding and insulating negligence, and (2) summary judgment was not proper pursuant to N.C. Gen. Stat. § 20-145 (2009).

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The insurance policy also contains a “Sovereign Immunity Non-Waiver Endorsement” modifying the town’s policy, which reads:

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART COMMERCIAL AUTO COVERAGE FORM

LAW ENFORCEMENT LIABILITY COVERAGE PART PUBLIC OFFICIALS’ LIABILITY COVERAGE PART EDUCATORS LEGAL LIABILITY COVERAGE PART

In consideration of the premium charged, it is hereby agreed and understood that the policy(ies) coverage part(s) or coverage form(s) issued by us provide(s) no coverage for any “occurrence”, “offense”, “accident”, “wrongful act”, claim or suit for which any insured would otherwise have an exemption or no liability because of sovereign immunity, any governmental tort claims act or laws, or any other state or federal law. Nothing in this policy, coverage part or coverage form waives sovereign immunity for any insured.

Plaintiffs argue that these portions of the insurance policy are patently ambiguous because: (1) there is no “Commercial Auto Coverage Form,” and (2) the blanket statement in section H is not specific enough. Contrary to plaintiffs’ characterization of the Town of Franklinton’s insurance policy, we do not believe the insurance policy is ambiguous. Plaintiffs admit that section H applies to the entire insurance policy, and though the language therein is not as specific, we agree with defendants that this statement is substantially similar to the policy approved in *Patrick*. The policy in that case provided:

This policy is not intended by the insured to waive its governmental immunity as allowed by North Carolina General Statutes Sec. 153A-435. Accordingly, subject to this policy and the Limits of Liability shown on the Declarations, this policy provides coverage only for occurrences or wrongful acts for which the defense of governmental immunity is clearly not applicable or for which, after the defenses is [sic] asserted, a court of competent jurisdiction determines the defense of governmental immunity not to be applicable.

Patrick, 188 N.C. App. at 596, 655 S.E.2d at 923 (emphasis omitted).

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Since the record shows that defendants have not waived governmental immunity through their insurance policy, summary judgment was proper on this issue. This assignment of error is overruled.

D. Public Official Immunity

[5] Plaintiffs argue that the trial court erred by granting summary judgment to Officer Dunlap in his individual capacity, because the evidence shows that Officer Dunlap's actions were malicious or wanton. We do not agree.

“ ‘As a general rule it is presumed that a public official in the performance of his official duties “acts fairly, impartially, and in good faith and in the exercise of sound judgment or discretion, for the purpose of promoting the public good and protecting the public interest.” ’ ” *Greene v. Town of Valdese*, 306 N.C. 79, 82, 291 S.E.2d 630, 632 (1982) (citations omitted). “ ‘Police officers . . . are public officials.’ ” *Strickland v. Hedrick*, 194 N.C. App. 1, 10, 669 S.E.2d 61, 67 (2008). “ ‘Accordingly, ‘a public official engaged in the performance of governmental duties involving the exercise of judgment and discretion may not be held personally liable . . . unless it be alleged and proved that his act, or failure to act, was corrupt or malicious, or that he acted outside of and beyond the scope of his duties.’ ” *Id.* (citations omitted). “ ‘A defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another.’ ” In *Re Grad v. Kaasa*, 312 N.C. 310, 313, 321 S.E.2d 888, 890-91 (1984) (citation omitted).

As discussed at length above, plaintiffs have not forecast evidence which demonstrates that Officer Dunlap acted maliciously, wantonly, or recklessly in his pursuit of Ayscue. Accordingly, Officer Dunlap, in his individual capacity, is entitled to public official immunity. This assignment of error is overruled.

III. CONCLUSION

Based on the foregoing, we conclude that summary judgment was properly entered as to Officer Michael Dunlap in his official and individual capacities, Lieutenant John Green, Police Chief Ray Gilliam, and the Town of Franklinton. Accordingly, the order of the trial court is

Affirmed.

Judges McGEE and STROUD concur.

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[207 N.C. App. 311 (2010)]

STATE OF NORTH CAROLINA v. MARK DANIEL TERRY

No. COA10-9

(Filed 5 October 2010)

1. Evidence— motion to suppress statements—sheriff's department—no reasonable expectation of privacy—marital privilege inapplicable

The trial court did not err in a drugs case by denying defendant's motion to suppress statements made by defendant and his wife at the sheriff's department. Defendant did not have a reasonable expectation of privacy when there were warning signs that the premises were under audio and visual surveillance, and thus, the marital privilege was inapplicable.

2. Search and Seizure— motion to suppress drugs—"knock and announce" entry—exigent circumstances

The trial court did not err in a drugs case by denying defendant's motion to suppress evidence seized at his home as a result of a search warrant based on an alleged improper "knock and announce" before entering the premises. When the purpose of the search warrant was to search for illegal drugs, the time between law enforcement's "knock and announce" and their entry into the residence may be reduced.

3. Drugs— motion to dismiss—sufficiency of evidence—constructive possession of drugs

The trial court did not err by denying defendant's motions to dismiss the charges of felony possession of marijuana with intent to manufacture, sell, or deliver; felony possession of a Schedule II controlled substance; felony keeping or maintaining a dwelling for keeping a controlled substance; and misdemeanor possession of drug paraphernalia based on alleged insufficient evidence that defendant possessed the controlled substances seized at his residence. There were sufficient incriminating circumstances of constructive possession including that defendant lived at and owned a possessory interest in the residence, he shared the bedroom where drugs were found, and he made statements concerning the drugs.

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[207 N.C. App. 311 (2010)]

4. Appeal and Error— preservation of issues—failure to object at trial—failure to argue plain error

Although defendant contended the trial court erred by considering an SBI agent's visual identification of a white pill found in defendant's master bedroom as Methadose to be sufficient evidence to charge defendant with possession of a schedule II controlled substance, this argument was dismissed based on defendant's failure to object to the testimony and failure to argue plain error.

5. Appeal and Error— preservation of issues—failure to argue

The remaining assignment of error that defendant failed to argue was deemed abandoned under N.C. R. App. P. 28(b)(6).

Appeal by defendant from judgments entered 4 June 2009 by Judge Jack W. Jenkins in Onslow County Superior Court. Heard in the Court of Appeals 18 August 2010.

Attorney General Roy Cooper, by Special Deputy Attorney General Daniel S. Johnson, for the State.

James W. Carter, for defendant-appellant.

STEELMAN, Judge.

Where there were warning signs that the premises were under audio and visual surveillance, and there were cameras and recording devices throughout the Sheriff's Department and in the conference room where the conversation between defendant and his wife took place, defendant did not have a reasonable expectation of privacy and the marital privilege was not applicable. When the purpose of a search warrant is to search for illegal drugs, the time between law enforcement's "knock and announce" and their entry into the residence may be reduced. Where defendant lived at and owned a possessory interest in the residence, shared the bedroom where drugs were found, and defendant made statements concerning the drugs, there were sufficient incriminating circumstances to support submission of the possession charges to the jury under the theory of constructive possession.

I. Factual and Procedural History

On 21 June 2007, Sergeant Robert Ides ("Ides") of the Onslow County Sheriff's Department obtained a search warrant for Mark Daniel Terry's ("defendant's") residence based upon information

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received from a confidential informant who had seen marijuana in the residence. In addition, there had been anonymous calls from citizens complaining that drugs were being sold from the residence. Ides and his team executed the search warrant on 22 June 2007. The search produced marijuana and other drug paraphernalia. Defendant and his wife were arrested, and taken to the Onslow County Sheriff's Department, where they were placed in an interview room next to the narcotics office.

Defendant was subsequently indicted for (1) felony possession of marijuana with intent to manufacture, sell or deliver; (2) felony manufacture of marijuana; (3) misdemeanor child abuse based upon exposure of a child to illegal drugs; (4) felony possession of a Schedule II controlled substance (Methadose); (5) felony maintaining a dwelling for keeping and selling controlled substances; (6) misdemeanor possession of drug paraphernalia; and (7) conspiracy to commit the felonies enumerated above.

Prior to trial, defendant made a motion to suppress the contraband that was seized during the search of defendant's home, asserting that police violated the "knock and announce" requirement when the search warrant was executed. Defendant's motion was denied. Defendant also filed two motions to suppress evidence of statements made by defendant and his wife at the Onslow County Sheriff's Department based upon marital privilege. These motions were heard and denied prior to trial.

At the close of the State's evidence, the trial court dismissed the felony manufacture of marijuana and felony conspiracy charges. The State voluntarily dismissed the misdemeanor child abuse charge. The jury found defendant guilty of felony possession of marijuana with intent to manufacture, sell or deliver; felony possession of a Schedule II controlled substance; felony keeping or maintaining a dwelling for keeping a controlled substance; and misdemeanor possession of drug paraphernalia. Defendant was sentenced to two consecutive six to eight month sentences, which were suspended. Defendant was placed on supervised probation for 36 months under regular and special conditions of probation.

Defendant appeals.

II. Motion to Suppress Statements

[1] In his first argument, defendant contends that the trial court erred in denying his motion to suppress statements made by defendant and his

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wife at the Onslow County Sheriff's Department, because the statements were protected by the privilege for communications between a husband and wife. We disagree.

A. Standard of Review

Generally, an appellate court's review of a trial court's order on a motion to suppress is strictly limited to a determination of whether its findings are supported by competent evidence, and in turn, whether the findings support the trial court's ultimate conclusion. Where, however, the trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal. . . . Accordingly, we review the trial court's order to determine only whether the findings of fact support the legal conclusion[s]. . . .

State v. White, 184 N.C. App. 519, 523, 646 S.E.2d 609, 611-12 (2007) (quotation omitted), *disc. review denied*, 361 N.C. 702, 653 S.E.2d 160 (2007).

Defendant's assignment of error challenges only the trial court's denial of his motion to suppress, and does not challenge any of the trial court's findings of fact. The trial court's findings are binding on appeal, and our review is limited to whether these findings support the trial court's conclusions of law. *State v. Icard*, 363 N.C. 303, 308, 677 S.E.2d 822, 826 (2009).

B. Marital Privilege

The North Carolina General Statutes provide that “[n]o husband or wife shall be compellable in any event to disclose any *confidential communication* made by one to the other during their marriage.” N.C. Gen. Stat. § 8-57(c) (2009) (emphasis added). The privilege codified in N.C. Gen. Stat. § 8-57(c) is an extension of the common-law marital communication privilege that “allows marriage partners to speak freely to each other in confidence without fear of being thereafter confronted with the confession in litigation.” *State v. Freeman*, 302 N.C. 591, 596, 276 S.E.2d 450, 453-54 (1981).

Whether defendant's communications with his wife while at the Onslow County Sheriff's Department were protected by this privilege hinges on whether those statements constitute confidential communications. To qualify as a confidential marital communication under N.C. Gen. Stat. § 8-57(c), the communication must be one that was “induced by the marital relationship and prompted by the affection,

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confidence, and loyalty engendered by such relationship.” *Id.* at 598, 276 S.E.2d at 454 (citations omitted). There must also be “[1] a reasonable expectation of privacy on the part of the holder and [2] the intent that the communication be kept secret.” *State v. Rollins*, 363 N.C. 232, 238, 675 S.E.2d 334, 338 (2009). In determining whether a reasonable expectation of privacy existed, “[t]he circumstances in which the communication takes place, including the physical location and presence of other individuals” are taken into account. *Id.* at 237, 675 S.E.2d at 337 (citation omitted).

The trial court made the following findings of fact:

That the defendant and defendant’s wife were taken to the Onslow County Sheriff’s Department;

That they did enter the Sheriff’s Department and there are warning signs in the Sheriff’s Department to the effect of under audio and visual surveillance;

There are cameras and recording devices throughout the facility in the Onslow County Sheriff’s Department;

That the defendant and his wife were taken to an interview room, a room specifically set up for interviews for witnesses and suspects. The defendant and his wife were not handcuffed in the room, were free to speak on their own without anyone else in the room. The room had no windows. There was a camera that not only recorded visually but also sound and film of what was going on in the room;

That a conversation did take place between the husband and the wife in the room. Conversation can be heard on the recording that was made;

...

That the individuals spoke at length in the room. There are statements made that could be deemed to be against the interest of the defendant and basically the husband and wife conversation appeared to be a conversation between two individuals charged with a crime or suspected of a crime and was not a conversation that would appear to be one between a husband and wife, per se. It was not a conversation that appeared to be a marital conversation or a conversation that would be induced by the marital relationship or one prompted by affection, confidence or loyalty engendered by said relationship but instead

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a conversation between two individuals that were implicated in some crime, and DVD speaks for itself along those lines.

The Court finds that was at that [sic] nature of the conversation and not a conversation somehow part of the marital relationship or induced by the factors just mentioned.

Based upon the Supreme Court decision in *State v. Rollins*, 363 N.C. 232, 675 S.E.2d 334, the trial court held that defendant did not have a reasonable expectation of privacy as to these conversations, and denied defendant's motions to suppress. The State subsequently introduced portions of the video and audio. The substance of the conversation between defendant and his wife was summarized in the Sheriff's Department investigation report, which was quoted in defendant's motion to suppress:

While in the (interrogation)/interview room at the sheriff's office, suspects Mark Terry and Ester Terry are observed talking to one another about the amount of Marijuana found and about a second house and wondering how we found out about it. Both showed obvious knowledge of the drugs found in the residence. They were also trying to figure out who the informant was. Ester Terry also was making comments about her not giving us all of her information.

Ester Terry also told defendant, "I'll tell them it was mine." The trial court went on to hold:

[W]e had a defendant and wife who were in an interview room in a facility that is a law enforcement facility in a room designed to interview defendants or suspects or witnesses in crimes in a facility that has clearly marked that conversations and so forth are under 24 hour surveillance and conversation that clearly appears to be between two individuals who are implicated in wrongdoing as opposed to a husband and wife who are somehow expressing loyalty, affection and confidence with each other.

In *State v. Rollins*, our Supreme Court held that conversations between a husband and wife in the public visiting area of a correctional facility did "not qualify as confidential communications under section 8-57(c)." 363 N.C. at 235, 675 S.E.2d at 336. The Supreme Court further held that "incarcerated persons have a diminished expectation of privacy." *Id.* at 239, 675 S.E.2d at 338. The New York case of *Lanza v. New York* was cited with approval for the proposition that "to say that a public jail is the equivalent of a man's 'house'

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or that it is a place where he can claim constitutional immunity from search or seizure . . . is at best a novel argument. . . . In prison, official surveillance has traditionally been the order of the day.” *Rollins*, 363 N.C. at 239, 675 S.E.2d at 339 (citing *Lanza v. New York*, 370 U.S. 139, 143, 8 L. Ed. 2d 384, 388-89 (1962)).

The rationale that the spouses may ordinarily take effective measures to communicate confidentially tends to break down where one or both are incarcerated. However, communications in the jailhouse are frequently held not privileged, often on the theory that no confidentiality was or could have been expected.

Rollins, 363 N.C. at 240, 675 S.E.2d at 339 (citing Kenneth S. Broun et al., *McCormick on Evidence* § 82 (6th ed. 2006)). In the instant case, both defendant and his wife had been placed under arrest and were in an interview room. There were warning signs in the Sheriff’s Department that the premises were under audio and visual surveillance. There were cameras and recording devices throughout the Sheriff’s Department, and in the conference room. Given these undisputed findings of fact, they support the trial court’s conclusion that defendant and his wife did not have a reasonable expectation of privacy in the interview room.

This argument is without merit.

III. Motion to Suppress Evidence from Defendant’s Residence

[2] In his second argument, defendant contends that the trial court erred in denying defendant’s motion to suppress evidence seized at his home as a result of the search warrant because the police failed to properly “knock and announce” their presence and intent before entering the premises. We disagree.

A. Standard of Review

As discussed in the preceding section, the trial court’s findings of fact are binding if supported by competent evidence. *Icard*, 363 N.C. at 308, 677 S.E.2d at 826. If supported by competent evidence, those findings are conclusive even where conflicting evidence exists. *State v. Simpson*, 314 N.C. 359, 368, 334 S.E.2d 53, 59 (1985). We review the trial court’s conclusions of law *de novo*. *Icard*, 363 N.C. at 308, 677 S.E.2d at 826.

B. Knock and Announce

The Fourth Amendment to the United States Constitution protects “[t]he right of the people to be secure . . . against unreasonable

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searches and seizures” from either state or federal officers. U.S. Const. amend. IV; *Wilson v. Arkansas*, 514 U.S. 927, 931, 131 L. Ed. 2d 976, 980 (1995). Such protection is also part of the North Carolina Constitution. See N.C. Const. art. I, § 20. Part of the reasonableness requirement of the Fourth Amendment is that an officer, prior to entering a residence to serve a warrant, must “knock and announce” his or her presence. *Wilson*, 514 U.S. at 929, 131 L. Ed. at 979. In addition to federal requirements¹, the “knock and announce” requirement is codified in North Carolina’s General Statutes:

The officer executing a search warrant must, before entering the premises, give appropriate notice of his identity and purpose to the person to be searched, or the person in apparent control of the premises to be searched. If it is unclear whether anyone is present at the premises to be searched, he must give the notice in a manner likely to be heard by anyone who is present.

N.C. Gen. Stat. § 15A-249 (2009). “This Court has repeatedly stated that ‘what is a reasonable time between notice and entry depends on the particular circumstances in each case.’” *State v. Reid*, 151 N.C. App. 420, 426, 566 S.E.2d 186, 190 (2002) (quotation omitted). Where exigent circumstances exist when a search warrant is executed, a brief delay between notice and forced entry is more likely to be considered reasonable. *State v. Knight*, 340 N.C. 531, 543, 459 S.E.2d 481, 489 (1995). Exigent circumstances may be found to exist where police are executing a search warrant for narcotics which may be easily disposed of prior to being discovered. See *State v. Sumpter*, 150 N.C. App. 431, 434, 563 S.E.2d 60, 62 (2002).

In the instant case, the trial court found as fact that (1) “the officers did knock on the door, did shout, did announce Sheriff’s Department and search warrant,” and (2) that the door was open, not locked or blocked in any way. Each of these findings of fact were supported by competent evidence presented by the State and at the *voir dire* hearing. Ides testified that the first thing they did, after arriving at the residence, was to check to see if the door was locked. On finding it unlocked, Ides testified that they announced “Sheriff’s Department, search warrant,” the door was opened, and the police entered the dwelling. Captain John Lewis also testified that he heard Ides knock and announce “Sheriff’s Department.”

Based upon these findings of fact, the trial court concluded that the knock and announce procedure was executed in a fashion that

1. The “knock and announce” requirement is also codified at 18 U.S.C. § 3109.

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was compliant with § 15A-249 of the General Statutes, and that the rights of the defendant to be free from unreasonable search and seizure were not violated. Defendant contends that the trial court erred in this conclusion in part because there was not a long period of time between the “knock and announcement” and when the officers entered the house. However, the search warrant was issued based upon information that marijuana was being sold from the house. Since this was a drug that could be easily and quickly disposed of, we hold that the brief delay between notice and entry was reasonable in this case. *See Knight*, 340 N.C. at 543, 459 S.E.2d at 489. The trial court correctly determined that the knock and announce procedure was properly executed, and that defendant’s constitutional right against unreasonable searches and seizures was not violated.

This argument is overruled.

IV. Motions to Dismiss for Insufficient Evidence of Possession

[3] In his third argument, defendant contends that the trial court erred in denying his motions to dismiss for insufficient evidence that defendant possessed the controlled substances seized at his residence. We disagree.

A. Standard of Review

The standard for ruling on a motion to dismiss is whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense. Substantial evidence is relevant evidence which a reasonable mind might accept as adequate to support a conclusion. In ruling on a motion to dismiss, the trial court must consider all of the evidence in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence. Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal.

State v. Webb, 192 N.C. App. 719, 721, 666 S.E.2d 212, 214 (2008) (quoting *State v. Wood*, 174 N.C. App. 790, 795, 622 S.E.2d 120, 123 (2005)). To properly deny a motion to dismiss for insufficient evidence, the trial court must only determine that there is some evidence tending to prove guilt or which reasonably leads to the conclusion that defendant had constructive possession as a fairly logical and legitimate deduction. *State v. Laws*, 345 N.C. 585, 592-93, 481 S.E.2d 641, 644-45 (1997).

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Defendant elected to present evidence, and has consequently waived his right to object to the trial court's decision not to dismiss at the close of the State's evidence. *Id.* at 592, 481 S.E.2d at 644. Only defendant's motion to dismiss at the close of all the evidence is before this Court. *Id.*

B. Constructive Possession

The State concedes that the evidence does not show that defendant was in actual physical possession of the controlled substances; thus we review the evidence under the doctrine of constructive possession. A defendant "has possession [] of contraband material within the meaning of the law when he has both the power and intent to control its disposition or use." *State v. Weems*, 31 N.C. App. 569, 570-71, 230 S.E.2d 193, 194 (1976) (citation omitted). Constructive possession applies when a person does not have actual physical possession but still has the intent and capability to maintain control over the controlled substance. *State v. Alston*, 131 N.C. App. 514, 519, 508 S.E.2d 315, 318 (1998). "Where [contraband is] found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession." *State v. McNeil*, 359 N.C. 800, 809-10, 617 S.E.2d 271, 277 (2005) (internal citations and quotations omitted). However, where possession of the place where the narcotics are found is non-exclusive, "the State must show *other incriminating circumstances* before constructive possession may be inferred." *Id.*

In the instant case, defendant lived at and owned a possessory interest in the residence where the controlled substances were found. He also shared the master bedroom where the majority of the marijuana and drug paraphernalia were found. He was in the living space adjoining the master bedroom at the residence when the search warrant was executed. There were drugs in plain view in the back bedroom. He demonstrated actual control over the premises in demanding the search warrant. Further, in the conversation defendant had with his wife at the Onslow County Sheriff's office, they questioned each other on how the police found out about the marijuana, and who was the confidential informant indicating that the contraband belonged to defendant. His wife also stated: "I'll tell them it was mine." This constituted sufficient incriminating evidence to support the submission of the issue of constructive possession to the jury. *See e.g., State v. Davis*, 325 N.C. 693, 699, 386 S.E.2d 187, 191 (1989)

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(where defendant was present in mobile home where controlled substances were found, was presented with the search warrant, and whose name was on the bill of sale for the home, there were sufficient other incriminating circumstances to infer constructive possession of controlled substance); *State v. Baxter*, 285 N.C. 735, 736-38, 208 S.E.2d 696, 697-98 (1974) (finding constructive possession when the defendant was absent from the apartment when police arrived but a search of the bedroom that the defendant and his wife occupied yielded men's clothing and marijuana in a dresser drawer, with additional marijuana found in the pocket of a man's coat in the bedroom closet).

This argument is without merit.

V. Identification of a controlled substance

[4] In his fourth argument, defendant contends that SBI Agent Irwin Allcox's visual identification of the white pill found in defendant's master bedroom as Methadose, a controlled substance, was not sufficient evidence to charge defendant with possession of a schedule II controlled substance. We disagree.

Defendant failed to object to Agent Allcox's testimony at trial and has not specifically argued that the trial court committed plain error. Under these circumstances, this Court will not review whether the alleged error rises to the level of plain error. *State v. Evan*, 125 N.C. App. 301, 304, 480 S.E.2d 435, 437 (1997), *disc. review denied*, 346 N.C. 551, 488 S.E.2d 813 (1997).

This argument is dismissed.

[5] Defendant does not argue his remaining assignment of error, and it is deemed abandoned. N.C.R. App. P. 28(b)(6).

NO ERROR.

Judges STEPHENS and HUNTER, JR., ROBERT N. concur.

STATE v. PATINO

[207 N.C. App. 322 (2010)]

STATE OF NORTH CAROLINA v. JONATHAN PATINO

No. COA10-201

(Filed 5 October 2010)

1. Witnesses— motion to sequester—motion denied—collusion or tailoring not suspected

The trial court did not abuse its discretion by denying defendant's motion to sequester witnesses where defendant offered as grounds only that there were a number of witnesses and that the crime had happened almost a year before the trial. Defense counsel did not explain or give specific reasons at trial to suspect that the witnesses would tailor their testimony, and did not argue that the unsequestered witnesses actually colluded with each other or influenced each other's testimony.

2. Witnesses— motion to sequester—explanation of denial— not required

A trial court was not required to explain to the parties its discretionary ruling on a motion to sequester.

3. Sexual Offenses— sexual battery—evidence of intent— sufficient

The trial court did not err by denying defendant's motion to dismiss a charge of sexual battery for insufficient evidence that the contact was for the purpose of sexual arousal, sexual gratification, or sexual abuse. In the light most favorable to the State, the evidence supported an inference that defendant grabbed the victim for those purposes.

4. Jury— researching legal terms on Internet—new trial denied

The trial court did not abuse its discretion by denying defendant's motion for a new trial based on alleged juror misconduct without making further inquiry where several jurors admitted looking up legal terms on the Internet during the trial. Definitions of legal terms are not extraneous information and did not implicate defendant's constitutional right to confront witnesses against him.

Appeal by defendant from judgments entered 17 and 20 November 2009 by Judge Zoro J. Guice in Henderson County Superior Court. Heard in the Court of Appeals 15 September 2010.

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[207 N.C. App. 322 (2010)]

Attorney General Roy Cooper, by Caroline Farmer, Deputy Director, N.C. Department of Justice, for the State.

Carol Ann Bauer for defendant-appellant.

BRYANT, Judge.

Where defendant's trial counsel failed to give specific reasons to suspect that the State's witnesses would tailor their testimony if not sequestered, the trial court did not abuse its discretion in denying defendant's motion to sequester. Where the evidence supported an inference by the jury that defendant's action was for the purpose of sexual arousal, gratification or abuse, the trial court did not err in denying defendant's motion to dismiss for insufficiency of the evidence. Where no prejudicial misconduct by jurors was suggested, the trial court did not err in denying defendant's motion for a new trial based on alleged juror misconduct without making further inquiry.

Facts

On 7 February 2009, a car in which defendant Jonathan Patino was a passenger was pulled over by an officer with the Hendersonville Police Department. The driver of the vehicle agreed to a search of her car and all of the occupants got out of the vehicle. During a pat-down of the occupants, the officer discovered a tube of what turned out to be methamphetamine in defendant's pants pocket. The officer also noticed that defendant had something in his mouth and ordered him to spit it out. The object was yellow latex material such as that used in balloons. Defendant initially claimed the balloon had contained cocaine. The officer arrested defendant who at that time was able to walk and talk normally. Later at the jail, defendant asked for a nurse and admitted he had actually swallowed methamphetamine. He complained of blurry vision, rapid heart beat and black outs. Defendant was still able to walk and was escorted by an officer to Pardee Hospital. At the hospital, defendant was released into the custody of his mother.

Kristian Gilbert was a twenty-year-old trauma nurse in the ICU at the hospital. While Gilbert was stocking defendant's hospital room several hours after his admission, defendant attempted to talk to her, asking for her phone number and for a date. Later that morning, Gilbert returned to defendant's room and helped him to the bathroom. As Gilbert was putting defendant back into bed, he brushed his foot on her thigh. Gilbert reported the incident to the nurse in charge and was told not to be alone in his room anymore. Awhile later,

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Gilbert and another nurse were in defendant's room removing medical leads from defendant so he could leave the hospital. The other nurse was called from the room, leaving Gilbert and defendant alone in the room, and defendant grabbed Gilbert's crotch. Gilbert left the room immediately and reported the incident, asking that charges be pressed against defendant.

On 25 February 2009, defendant was arrested for sexual battery; he pled guilty to that charge in district court and then appealed his conviction to superior court for a jury trial. On 17 November 2009, defendant pled guilty to charges of possession of methamphetamine and possession of drug paraphernalia. The trial court sentenced defendant to six to eight months in prison, suspended and imposed the condition of supervised probation.¹ At the same session, a jury found defendant guilty of sexual battery, for which the trial court sentenced him to seventy-five days in jail. From this judgment and sentence on the sexual battery conviction, defendant appeals.

On appeal, defendant presents three arguments: that the trial court erred in denying 1) his motion to sequester the State's witnesses; 2) his motions to dismiss for insufficiency of the evidence; and 3) his motion for a new trial based on alleged juror misconduct.

I

[1] Defendant first argues that the trial court erred in denying his motion to sequester the State's witnesses. We disagree.

"A ruling on a motion to sequester witnesses rests within the sound discretion of the trial court, and the court's denial of the motion will not be disturbed in the absence of a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Call*, 349 N.C. 382, 400, 508 S.E.2d 496, 507-8 (1998) (citation omitted). Section 15A-1225 of our General Statutes provides that "[u]pon motion of a party the judge may order all or some of the witnesses other than the defendant to remain outside of the courtroom until called to testify[.]" N.C. Gen. Stat. § 15A-1225 (2009); *see also* N.C. Gen. Stat. § 8C-1, Rule 615 (2009). "The aim of sequestration is two-fold: First, it acts as a restraint on witnesses tailoring their testimony to that of earlier witnesses, and second, it aids in detecting testimony that is less than candid." *State v. Harrell*, 67 N.C. App. 57, 64, 312 S.E.2d 230,

1. That plea and sentence are not at issue in this appeal.

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236 (1984). However, “[w]hile it is true that one of the purposes for requiring sequestration is to prevent witnesses from tailoring their testimony from that of earlier witnesses, in order to show error a defendant must show that the trial court abused its discretion.” *State v. Pittman*, 332 N.C. 244, 254, 420 S.E.2d 437, 442 (1992). In *Pittman*,

the trial court heard arguments of counsel prior to denying defendant’s motion. Having reviewed those arguments, we cannot hold that the trial court abused its discretion by denying defendant’s motion. When asked by the court, defendant gave no reason for suspecting that the State’s witnesses would use previous witnesses’ testimony as their own.

Id. at 254, 420 S.E.2d at 443. As a result, we held that the defendant had “failed to show that the trial court abused its discretion” and overruled the defendant’s argument. *Id.* Similarly, in *State v. Anthony*, the Supreme Court found no abuse of discretion in the denial of a defendant’s motion to sequester witnesses. 354 N.C. 372, 396, 555 S.E.2d 557, 575, *cert. denied*, 354 N.C. 575, 559 S.E.2d 184 (2001). There, the Court noted that

[i]n his motion to sequester, [the] defendant gave no specific reason to suspect that the State’s witnesses would tailor their testimony to fit within a general consensus. [The d]efendant has not pointed to any instance in the record where a witness conformed his or her testimony to that of another witness, and he argues on appeal only that the trial court was biased against him in denying his motion even though facilities were available to accommodate sequestered witnesses.

Id.

Similarly, we see no abuse of discretion here. The transcript indicates that defendant moved for sequestration of all the State’s witnesses and offered to sequester his own as well. Defense counsel explained the request by stating:

As we discussed this morning, this case kind of piggy[-]backed on the felony, and just—we wanted to go ahead and get everything up here in Superior Court, and to get everything up here there wasn’t a—obviously since it was a misdemeanor, there was no probable cause hearing and there was not a trial in District Court, and so that being said, Your Honor, the general [sic] being in North Carolina to separate witnesses and for hearing when requested by counsel since the crime has happened almost a year ago at this

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time and increases the ability of people to forget, and the fact that there are a number of witnesses testifying for the State. We didn't have any type of trial in District Court. We would be making a motion to sequester witnesses, and I have provided [the State] with a list of witnesses, and we would be more than happy to have that motion apply to out witnesses as well and have them sequestered as well if [the State] would be requesting that as well.

The State replied that it thought sequestration was not necessary but had no objection. The trial court then denied the motion to sequester.

Defense counsel suggested two grounds for sequestration: that there were a "number" of witnesses and that they might have forgotten in the time since the incident occurred. Neither of these is a typical reason for sequestering witnesses. *See Harrell*, 67 N.C. App. at 64, 312 S.E.2d at 236. Nor did defendant's trial counsel explain or give specific reasons to suspect that the State's witnesses would tailor their testimony. Based on the brief and rather disjointed argument put forward by defendant's trial counsel, it is not clear to this Court how sequestration would affect or be related to the number of witnesses and the time elapsed since the alleged offense occurred. We also note that defendant does not make any argument on appeal that the unsequestered State's witnesses actually colluded with each other or influenced each other's testimony. We see no abuse of discretion by the trial court.

[2] Defendant also contends that the trial court abused its discretion in denying his motion because "[d]enying a motion without explanation and then telling the parties that it was fine to do is an arbitrary decision with no basis in reasoned thinking." However, defendant cites no authority for this assertion and we know of none. A trial court is not required to explain or defend its ruling on a motion to sequester. This argument is overruled.

II

[3] Defendant next argues that the trial court erred in denying his motions to dismiss for insufficiency of the evidence. We disagree.

We review the trial court's denial of a motion to dismiss for insufficiency of the evidence de novo. *State v. Bumgarner*, 147 N.C. App. 409, 412, 556 S.E.2d 324, 327 (2001).

When a defendant moves for dismissal, the trial court is to determine only whether there is substantial evidence of each essential

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element of the offense charged and of the defendant being the perpetrator of the offense. . . . Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The term “substantial evidence” simply means that the evidence must be existing and real, not just seeming or imaginary. The trial court’s function is to determine whether the evidence will permit a *reasonable inference* that the defendant is guilty of the crimes charged. In so doing the trial court should only be concerned that the evidence is sufficient to get the case to the jury; it should not be concerned with the weight of the evidence. It is *not* the rule in this jurisdiction that the trial court is required to determine that the evidence excludes every reasonable hypothesis of innocence before denying a defendant’s motion to dismiss.

State v. Vause, 328 N.C. 231, 236-37, 400 S.E.2d 57, 61 (1991) (internal citations and quotation marks omitted). Further, in ruling on a motion to dismiss:

The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion. The test of the sufficiency of the evidence to withstand the defendant’s motion to dismiss is the same whether the evidence is direct, circumstantial, or both. Therefore, if a motion to dismiss calls into question the sufficiency of circumstantial evidence, the issue for the court is whether a reasonable inference of the defendant’s guilt may be drawn from the circumstances.

Id. at 237, 400 S.E.2d at 61 (internal citations and quotation marks omitted).

Our General Statutes defines the misdemeanor of sexual battery as follows:

(a) A person is guilty of sexual battery if the person, for the purpose of sexual arousal, sexual gratification, or sexual abuse, engages in sexual contact with another person:

(1) By force and against the will of the other person[.]

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N.C. Gen. Stat. § 14-27.5A (2009). Testimony from a victim that the defendant locked a door, reached under her blouse and rubbed her breast, and then stopped when someone tried to enter the locked door was sufficient for “the jury [to] infer that [the] defendant’s action . . . was for the purpose of arousing or gratifying his sexual desire.” *State v. Bruce*, 90 N.C. App. 547, 551, 369 S.E.2d 95, 98 (discussing a charge of taking indecent liberties with a child which includes the element “for the purpose of arousing or gratifying sexual desire”), *disc. review denied*, 323 N.C. 367, 373 S.E.2d 549 (1988).

Defendant did not dispute that his grabbing of Gilbert’s crotch was sexual contact or that it was against Gilbert’s will. However, defendant moved to dismiss on the basis that the State had failed to present sufficient evidence that the contact was “for the purpose of sexual arousal, sexual gratification, or sexual abuse.” He contends that he was merely flirting and that nothing indicated that he was aroused by the encounter.

Here, the evidence tended to show that defendant had previously asked Gilbert for her phone number and for a date, and brushed against her thigh in such a manner that Gilbert reported the incident to her supervisor and was instructed not to be alone with him. In the light most favorable to the State, this evidence supports an inference by the jury that defendant grabbed Gilbert’s crotch for the purpose of sexual arousal, gratification, or abuse. This argument is overruled.

III

[4] Defendant next argues that the trial court erred in denying his motion for a new trial based on alleged juror misconduct without making further inquiry. We disagree.

“Where juror misconduct is alleged, it is the duty of the trial judge to investigate the matter and to make such inquiry as is appropriate under the circumstances.” *State v. Childers*, 80 N.C. App. 236, 244, 341 S.E.2d 760, 765, *disc. review*, 317 N.C. 337, 346 S.E.2d 142 (1986) (citation omitted). “An examination is generally required only where some prejudicial content is reported.” *State v. Harrington*, 335 N.C. 105, 115, 436 S.E.2d 235, 240-41 (1993) (internal quotation marks and citation omitted). “The court’s determination of whether misconduct has occurred, and if so, whether it is prejudicial, will not be disturbed on appeal unless the ruling is clearly an abuse of discretion.” *Childers*, 80 N.C. App. at 245, 341 S.E.2d at 765-66.

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“In general, a trial court may not receive juror testimony to impeach a verdict already rendered.” *State v. Bauberger*, 176 N.C. App. 465, 469, 626 S.E.2d 700, 703, *affirmed*, 361 N.C. 105, 637 S.E.2d 536 (2006). Such inquiries are strictly limited under our General Statutes:

(c) After the jury has dispersed, the testimony of a juror may be received to impeach the verdict of the jury on which he served, subject to the limitations in subsection (a), only when it concerns:

(1) Matters not in evidence which came to the attention of one or more jurors under circumstances which would violate the defendant’s constitutional right to confront the witnesses against him; or

(2) Bribery, intimidation, or attempted bribery or intimidation of a juror.

N.C. Gen. Stat. § 15A-1240 (2009). We have held that the defendant in a sex offense case was not entitled to relief under this section where the jury foreman disobeyed the instructions of the trial court and watched a television program on child abuse, because the matters he reported to the jury did not deal directly with the defendant or with the evidence introduced in the case. *State v. Rosier*, 322 N.C. 826, 832, 370 S.E.2d 359, 362-63 (1988).

Further,

[u]pon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury’s deliberations or to the effect of anything upon his or any other juror’s mind or emotions as influencing him to assent or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury’s attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

N.C.G.S. § 8C-1, Rule 606(b) (2009). Extraneous prejudicial information is “information dealing with the defendant or the case which is being tried, which information reaches a juror without being introduced in evidence.” *Rosier*, 322 N.C. at 832, 370 S.E.2d at 363. Dictionary defi-

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nitions of legal terms researched and read to the jury by the foreperson are not extraneous prejudicial information and cannot be used to impeach a jury's verdict. *Bauberger*, 176 N.C. App. at 472, 626 S.E.2d at 705.

Here, the day after the verdict was delivered, at the start of the sentencing hearing, defendant's trial counsel moved for a new trial and told the trial court that several jurors had spoken with defense counsel and admitted looking up various legal terms (sexual gratification, reasonable doubt, intent, etc.), as well as the sexual battery statute, on the Internet during the trial. Defense counsel contended that the jury committed misconduct by consulting outside sources of information and disobeying the trial court's instruction not to do so. The trial court did not conduct any further inquiry and denied defendant's motion. Because definitions of legal terms are not extraneous information under Rule 606 and did not implicate defendant's constitutional right to confront witnesses against him, the allegations raised by defendant's trial counsel were not proper matters for an inquiry by the trial court. Thus, the trial court did not abuse its discretion in failing to conduct further inquiry into the allegations or in denying defendant's motion for a new trial. This argument is overruled.

No error.

Judges STEELMAN and BEASLEY concur.

RAYMOND L. MCGUIRE AND WIFE, ROBERTA M. MCGUIRE, PLAINTIFFS V. DAVID R. DIXON, AND WIFE, JEAN-LOUISE DIXON, DEFENDANTS

No. COA09-1536

(Filed 5 October 2010)

1. Appeal and Error—interlocutory order—substantial right—possibility of inconsistent verdicts

Although defendants' appeal from the denial of their counterclaims for unfair and deceptive trade practices and fraud was from an interlocutory order, the right to avoid the possibility of two trials on the same issues with the possibility of inconsistent verdicts based on overlapping factual issues affected a substantial right, thus allowing for immediate review.

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2. Statutes of Limitation and Repose— sealed instrument— extended limitations period

A *de novo* review revealed that the trial court erred by concluding that defendants' counterclaims for fraud and unfair and deceptive trade practices were barred by N.C.G.S. §§ 1-52(9) and 75-16.2. The ten-year statute of limitation under N.C.G.S. § 1-47(2) should have been applied to the counterclaims given that the promissory notes and modification agreement were signed under seal and conveyed an interest in real property.

Appeal by defendants from order entered 4 September 2009 by the Honorable Alma L. Hinton in Dare County Superior Court. Heard in the Court of Appeals 28 April 2010.

White & Allen, P.A., by John P. Marshall, for plaintiff appellees.

Dixon & Dixon Law Offices, P.L.L.C., by David R. Dixon, for defendant appellants.

HUNTER, JR., Robert N., Judge.

I. BACKGROUND

On 15 July 2004, David and Jean-Louise Dixon (collectively "defendants") purchased a rental home property from Raymond and Roberta McGuire (collectively "plaintiffs") known as Top Notch Villa, located in Iron Shore, Montego Bay, Jamaica. The purchase price for the property was \$440,000. Defendants made a \$75,000 cash down payment, and gave two promissory notes to plaintiffs for the remaining aggregated balance of \$365,000. Deeds of trust were executed on property located in Dare County, North Carolina, to secure payment of the notes.

On 15 November 2004, plaintiffs and defendants executed an "Agreement to Modify Notes," which called for a series of payments to be made in 2004 and 2005 to pay the balance and accrued interest owed on the promissory notes. Defendants made some, but not all, of the payments called for under the modification agreement. As of 1 July 2008, defendants owed plaintiffs \$168,800, with interest accruing at eight percent per annum.

After defendants defaulted and plaintiff made a demand for payment, plaintiffs filed a complaint on the promissory notes and modification agreement on 5 March 2009 seeking \$168,800 plus interest. Defendants filed an answer raising the defenses of mutual mistake

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and no consideration.¹ Defendants also counterclaimed for fraud and unfair and deceptive trade practices. The basis of defendants' counterclaims was the alleged misrepresentation of the profits produced by the villa by plaintiffs. Plaintiffs filed a motion to dismiss the counterclaims pursuant to N.C.R. Civ. P. 12(b)(6), and argued that the statute of limitations for fraud in N.C. Gen. Stat. § 1-52(9) (2009) (three years) and unfair and deceptive trade practices in N.C. Gen. Stat. § 75-16.2 (2009) (four years) had expired. After a hearing on the motion in Dare County Superior Court, the Honorable Alma L. Hinton issued an order on 4 September 2009 finding defendants' counterclaims were barred by the applicable statute of limitations. The trial court's order contained no certification for immediate appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure.

Defendants filed notice of appeal to this Court on 30 September 2009. Plaintiffs thereafter moved to dismiss the appeal, claiming that because their claims had not been adjudicated, the matter before this Court is interlocutory and not immediately appealable, given that no substantial right of defendants has been affected. Defendants filed a response in opposition to the motion to dismiss, stating that although interlocutory in nature, this appeal is subject to immediate review because a substantial right has been affected. The motion to dismiss and defendants' response were referred to this panel for a determination on the issues of: (1) whether jurisdiction is proper in this Court even though this appeal is interlocutory; and (2) if jurisdiction is proper, whether the trial court erred in finding that defendants' counterclaims are barred by the applicable statute of limitations.

II. ANALYSIS**A. Jurisdiction**

[1] We note that this appeal is interlocutory given that, while defendants' counterclaims for unfair and deceptive trade practices and fraud have been dismissed by the trial court and are now on appeal, plaintiffs' cause of action against defendants remains pending in the trial court. *Embler v. Embler*, 143 N.C. App. 162, 164, 545 S.E.2d 259, 261 (2001) (orders made during the pendency of an action not disposing of entire controversy at trial are interlocutory). "Generally, there is no

1. In their brief, plaintiffs attempt to characterize defendants' defense of mutual mistake as a counterclaim. However, in plaintiffs' motion to dismiss under Rule 12(b)(6), plaintiffs mention only the counterclaims of fraud and unfair and deceptive trade practices. Since the record shows that mutual mistake is a defense rather than a counterclaim, we treat it as such in this opinion.

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right of immediate appeal from interlocutory orders and judgments.” *Goldston v. American Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990).

An interlocutory order may be immediately appealed in only two circumstances: (1) when the trial court, pursuant to N.C.R. Civ. P. 54(b), enters a final judgment as to one or more but fewer than all of the claims or parties and certifies that there is no just reason to delay the appeal; or (2) when the order deprives the appellant of a substantial right that would be lost absent appellate review prior to a final determination on the merits.

High Rock Lake Partners v. N.C. DOT, 204 N.C. App. 55, 61, 693 S.E.2d 361, 366 (2010).

Our Supreme Court has stated that “the right to avoid the possibility of two trials on the same issues can be such a substantial right.” *Green v. Duke Power Co.*, 305 N.C. 603, 606, 290 S.E.2d 593, 595 (1982) (quotation marks and citation omitted). If overlapping issues are present between those argued on appeal and those remaining at trial, “[t]his Court has created a two-part test to show that a substantial right is affected, requiring a party to show ‘(1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exist[s].’” *Camp v. Leonard*, 133 N.C. App. 554, 558, 515 S.E.2d 909, 912 (1999) (citation omitted).

In this case, the possibility of inconsistent verdicts is present, because there are overlapping factual issues between defendants’ counterclaims here on appeal and the defenses remaining at the trial court. In their answer, defendants allege the following in support of their defenses and counterclaims:

Additional Facts in Answer to the Allegations

10. The Plaintiff Raymond McGuire traveled to the Outer Banks of North Carolina during the negotiations regarding the sale of the real property and the rental business.
11. During the negotiations in North Carolina, it was decided among the parties that the real property had a value of \$250,000.00.
12. During the negotiations in North Carolina, it was decided that the business of the Villa, which included the personal property associated with the Villa was worth \$190,000.00. The personal property included an automobile worth approximately

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\$10,000.00, furnishings worth approximately \$5,000.00 and the remaining bulk of the value assigned to the Villa was for the employee contracts and future earnings to be made from the rental of the property.

13. The Plaintiffs had a real estate agent named Ms. Parchment who acted on their behalf, spoke on their behalf, and presented various documents on their behalf, wherein it was stated in no uncertain terms that the profit after expenses of the Villa would be in excess of US \$40,000.00 per year.
14. Based upon the representation of the real estate agent, all the parties believed that the valuation of \$190,000.00 was a reasonable valuation for the business. The payments on the note or the business were designed to be approximately half of the income from the Villa, allowing the ongoing income of the Villa to pay for itself.
15. In actuality, the Villa does not create a profit of US \$40,000.00 per year, but rather requires the contribution of approximately \$1,000.00 to \$2,000.00 a month to maintain the expenses over and above the income of the Villa.

Mutual Mistake

16. The allegations presented above are incorporated herein by reference as if set forth word by word.
17. The Defendants exercised due diligence in determining the matter of income from the business of the Villa in that they: (1) discussed the matter of the income from the business of the Villa with the Plaintiff Raymond McGuire (2) traveled to Jamaica for the purpose of reviewing the rental program (3) obtained in writing an estimate of the costs and income for the rental of the Villa and (4) discussed in depth the matter of employees and other costs with the Plaintiff Raymond McGuire in their meeting in North Carolina.
18. The reliance by the Defendants on the Plaintiffs['] representations and the representations of their agent was reasonable.
19. The Defendants are entitled to rescission of the contract and the return of the funds paid for the business of the Villa.

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No Consideration

20. The allegations presented above are incorporated herein by reference as if set forth word by word.
21. There was no value obtained by the Defendants for the business of the Villa, in that it creates a loss not a profit, and therefore there was no consideration for the purchase of the business of the Villa, the monies paid or the promissory note.
22. The Defendants are entitled to rescission of the contract and the return of the funds paid for the business of the Villa.

The underlying factual issue presented in these defenses is whether plaintiffs made inaccurate representations regarding the Villa. These same transactions and occurrences are the factual predicate underlying defendants' counterclaims for unfair and deceptive trade practices and fraud. Were we to decline review of these two claims now brought on appeal, and thereafter the finder of fact found merit in defendants' defenses, there could be a conflict between that finding and any potential new trial on the claims of fraud and unfair and deceptive trade practices if this Court were to reverse and remand on these claims in a subsequent appeal. Thus, we conclude that defendants have demonstrated a possibility of conflicting verdicts, the avoidance of which is a substantial right,² and we deny plaintiffs' motion to dismiss. See *Bowman v. Alan Vester Ford Lincoln Mercury*, 151 N.C. App. 603, 566 S.E.2d 818 (2002) (substantial right held affected when summary judgment granted to third-party defendant where third-party defendant's representations presented common factual issues in plaintiff's claim against defendant and defendant's claim against third-party defendant). We therefore proceed to the merits of defendants' appeal.

B. Standard of Review

We review orders dismissing counterclaims under Rule 12(b)(6) *de novo*. See *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673-74

2. Ordinarily, the statement of grounds for appellate review is required to be contained in an appellant's brief, and there is no portion of the appellate rules that allows an appellant to refer this Court elsewhere for the grounds supporting our review. N.C.R. App. P. 28(b)(4) (2010). Here, defendants have not given a sufficient statement of grounds for appellate review in their brief; however, given that the motion to dismiss this appeal was referred to this panel, we grant review on the grounds better delineated in defendants' response to plaintiffs' motion to dismiss.

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(2003). “Upon review of a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, the question for the Court is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief could be granted under some legal theory.” *Brittain v. Cinnoca*, 111 N.C. App. 656, 659, 433 S.E.2d 244, 245 (1993).

C. Statute of Limitations

[2] In its order, the trial court concluded that defendants’ counterclaims for fraud and unfair and deceptive trade practices were barred by N.C.G.S. § 1-52(9) and N.C.G.S. § 75-16.2, respectively. Defendants argue that the trial court erred, because the ten-year statute of limitations in N.C. Gen. Stat. § 1-47(2) (2009) should have been applied to their counterclaims given that the promissory notes and modification agreement were signed under seal. We agree.

Section 1-47(2) of our General Statutes provides that, within ten years, an action may be instituted

[u]pon a sealed instrument or an instrument of conveyance of an interest in real property, against the principal thereto. Provided, however, that if action on an instrument is filed, the defendant or defendants in such action may file a counterclaim arising out of the same transaction or transactions as are the subject of plaintiff’s claim, although a shorter statute of limitations would otherwise apply to defendant’s counterclaim. Such counterclaim may be filed against such parties as provided in G.S. 1A-1, Rules of Civil Procedure.

N.C.G.S. § 1-47(2). In interpreting this statute, this Court has held that the extended limitations period in section 1-47(2) applies to claims on a sealed instrument, even though a shorter limitations period could otherwise apply. *Bank v. Holshouser*, 38 N.C. App. 165, 170, 247 S.E.2d 645, 648 (1978) (section 1-47(2) held to prescribe limitations period for action brought to enforce purchase money security agreement under Article 9 of the Uniform Commercial Code where agreement under seal).

Plaintiffs argue that section 1-47(2) does not apply to defendants’ counterclaims because: (1) the statute applies only to “consumer transactions such as automobile loans, appliances, and other purchase money retail credit” and truth in lending actions, and (2) the statute has never been applied to situations such as the one presented in the case *sub judice*.

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“Statutory interpretation properly begins with an examination of the plain words of a statute.” *State v. Dellinger*, 343 N.C. 93, 95, 468 S.E.2d 218, 220 (1996). “When a statute is clear and unambiguous, the Court will give effect to the plain meaning of the words without resorting to judicial construction.” *State v. Byrd*, 363 N.C. 214, 220, 675 S.E.2d 323, 325 (2009). “If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning. When, however, a statute is ambiguous, judicial construction must be used to ascertain the legislative will.” *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (quotation marks and citations omitted). “When multiple statutes address a single subject, this Court construes them in *pari materia* to determine and effectuate the legislative intent.” *Brown v. Flowe*, 349 N.C. 520, 523-24, 507 S.E.2d 894, 896 (1998).

Bearing these principles of interpretation in mind, we do not read section 1-47(2) to be so narrowly tailored as plaintiffs contend. In the article cited by plaintiffs to support their restricted interpretation, Professor Navin’s commentary provides, to the contrary of plaintiffs’ position, a broad reading of section 1-47(2).

A consumer sued by a financing agency sometimes faces problems of limitations and of third-party practice. In North Carolina, the limitation period on a sealed instrument is ten years, and nearly all negotiable promissory notes bear that magic word, “seal.” The ordinary contract action bears a limitation period of three years, and a cause of action sounding in fraud is limited to three years after the discovery of the facts constituting the fraud. Prior to 1969, a buyer who signed a negotiable promissory note as part of a consumer credit transaction could have found himself being sued by the holder when the statute of limitations on any claim he had against the seller had long since run. The buyer also faced questions of third-party practice when he attempted to implead the seller into the holder’s suit against him. An enactment by the 1969 General Assembly attempted to deal with these problems. This legislation amended the statute-of-limitations section concerning sealed instruments to provide that the maker of a sealed instrument can assert any claim arising out of the transaction against either the plaintiff or against a third party even though a shorter statute of limitations would otherwise bar such a claim. The same Act also permits the court, upon motion by the defendant-maker, to include in the holder’s action such parties as the assignor or transferor of the plaintiff. The Act then

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states that the purpose underlying it is “to insure that if a suit may be maintained on a contract against one contracting party, the other contracting party will not be allowed to escape his contractual obligations by the passage of time or the transfer of contract rights.”

Navin, *Waiver of Defense Clauses in Consumer Contracts*, 48 N.C. L. Rev. 505, 548-49 (1970) (footnotes omitted).

No part of this commentary nor any part of section 1-47(2) claim that the ten-year limitations period for counterclaims is limited merely to consumer transactions. Indeed, such reading would conflict directly with the plain language of section 1-47(2), which provides that the ten-year limitation period applies to “a sealed instrument or an instrument of conveyance of an interest in real property.” N.C.G.S. § 1-47(2). The latter part of the section, as Professor Navin correctly notes, extends the limitations period for counterclaims otherwise barred in order to allow the maker of either a “sealed instrument” or “instrument of conveyance of real property” to defend on an equal footing with the party seeking to collect on the underlying debt.

Here, there is no dispute that the promissory notes and the modification agreement were signed under seal and conveyed an interest in real property. Thus, under a plain reading of section 1-47(2), the ten-year statute of limitations applied to plaintiffs’ cause of action for collection on the negotiable instruments as well as any counterclaims that defendants may have against plaintiffs regarding the execution of the promissory notes and modification agreement. The trial court erred in applying the three-year limitations period for fraud in section 1-52(9) and the four-year statute of limitations for unfair and deceptive trade practices in section 75-16.2. Accordingly, we reverse and remand this case to the trial court for a determination of defendants’ counterclaims on the merits.

Reversed and remanded.

Judges McGEE and STROUD concur.

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[207 N.C. App. 339 (2010)]

CARY CREEK LIMITED PARTNERSHIP, PETITIONER v. TOWN OF CARY,
NORTH CAROLINA, RESPONDENT

No. COA10-38

(Filed 5 October 2010)

1. Cities and Towns— denial of variance—superior court review—findings of fact not prejudicial—scope of appellate review

The superior court did not err in affirming the decision of respondent Town of Cary which denied petitioner's request for a variance. Although the superior court was without authority to make additional findings of fact, the superior court's inclusion of such findings was not prejudicial error. The Court of Appeals declined to consider whether the superior court's findings were supported by competent evidence because the scope of appellate review was limited to whether the evidence before the town board supported its action. The Court of Appeals also declined to consider petitioner's challenge to the Town's procedure because petitioner failed to raise the issue in its petition for writ of *certiorari*.

2. Cities and Towns— denial of variance—appellate review—whole record test

Petitioner's argument that the Town of Cary's denial of a variance from the riparian buffer requirement was not supported by competent, material, and substantial evidence was overruled because the whole record test did not allow the Court of Appeals to replace the Town's judgment.

3. Zoning— denial of variance—town's findings sufficient

The Town of Cary's findings, which served as the bases for its denial of petitioner's variance request, were sufficient to inform the Court of Appeals of what induced the Town's decision, and the superior court correctly applied *de novo* review to this issue.

Appeal by petitioner from judgment entered 10 August 2009 by Judge Howard E. Manning, Jr. in Wake County Superior Court. Heard in the Court of Appeals 17 August 2010.

Robertson, Medlin & Bloss, PLLC, by John F. Bloss, and Smith Moore Leatherwood LLP, by Marc C. Tucker, for petitioner-appellant.

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Town of Cary, by Lisa C. Glover, Assistant Town Attorney, and Womble Carlyle Sandridge & Rice, by Michael T. Henry, for respondent-appellee.

MARTIN, Chief Judge.

Petitioner appeals from the superior court's order affirming the decision of the Town of Cary, North Carolina, which denied petitioner's request for a variance. We affirm the superior court's order.

Petitioner Cary Creek Limited Partnership owns an approximate 108-acre tract of land in Cary, North Carolina. This case arises from petitioner's attempt to obtain a variance from an ordinance enacted by respondent Town of Cary establishing riparian buffers within which no development may occur. We previously issued an opinion in a related dispute, *Cary Creek Ltd. Partnership v. Town of Cary*, — N.C. App. —, 690 S.E.2d 549 (2010), where we affirmed the trial court's grant of summary judgment to the Town on the issue of whether the ordinance was preempted by State law, and reversed on the issue of petitioner's inverse condemnation claim because it was not yet ripe.

Petitioner's tract is located near the intersection of Highway 55 and Alston Avenue in the Town of Cary. The tract is located within the Alston Activity Center Concept Plan ("AACCP"), a comprehensive development plan adopted by the Town of Cary in 2006. The northern portion of petitioner's tract is bordered by a perennial stream known as the Nancy Branch, which is located within the Cape Fear River Basin. Also on petitioner's tract, perpendicular to the Nancy Branch, are two intermittent streams—drainage areas that flow only during wet seasons—that are at the heart of this dispute.

The Town of Cary has a series of ordinances known collectively as its Land Development Ordinance ("LDO"). On 17 November 2006, the LDO included § 7.3, entitled "Stormwater Management."¹ Stormwater Management § 7.3.2 required 100-foot-wide riparian buffers on either side of all perennial and intermittent streams and 50-foot-wide riparian buffers adjacent to other surface waters.

On 17 November 2006, petitioner submitted an application requesting a variance from riparian buffer requirements pursuant to § 7.3.7. Petitioner sought to fill in two riparian areas and "develop

1. The Town has since revised its ordinances. The parties have stipulated that petitioner's development is subject to the previous ordinance scheme in place when petitioner filed its sketch plan.

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[its] Site into a commercial retail center with a residential component.” Petitioner contended that the variance was necessary “to meet the desired higher-density development called for in the AACCP, and to make development of the site commercially feasible.” Petitioner’s sketch plan indicated that parts of two buildings and a parking area, as well as half of a street, would be located within the protected riparian buffer areas. At the time it submitted its application, petitioner had already received approval from the U.S. Army Corps of Engineers and the North Carolina Department of Environmental and Natural Resources, Division of Water Quality, which regulate the water in those areas, to fill in the two intermittent streams.

On 26 April 2007, the matter came before the Town Council. After hearing the evidence, council member Portman proposed several findings of fact and moved to deny petitioner’s request for a variance. The council briefly discussed the motion and voted four to one to adopt it and deny petitioner’s request. On 29 May 2007, petitioner filed a verified petition for a writ of certiorari in the Superior Court of Wake County requesting, among other things, that the superior court enter an order reversing the denial of petitioner’s application for a variance and directing the Town of Cary to issue the variance. On 10 August 2009 the superior court entered judgment affirming the council’s decision.

I.

[1] Petitioner first contends the superior court erred by making findings of fact, and contends those findings are not binding on this Court. Petitioner then challenges two such findings, arguing that they are unsupported by the evidence.

Judicial review of the decisions of a municipal board of adjustment in the superior court is authorized by N.C.G.S. § 160A-388. N.C. Gen. Stat. § 160A-388(e2) (2009) (“Every decision of the board shall be subject to review by the superior court by proceedings in the nature of certiorari.”). In reviewing a decision of a board of adjustment, the superior court should

- (1) review the record for errors of law; (2) ensure that procedures specified by law in both statute and ordinance are followed; (3) ensure that appropriate due process rights of the petitioner are protected, including the right to offer evidence, cross-examine witnesses, and inspect documents; (4) ensure that the decision is

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supported by competent, material, and substantial evidence in the whole record; and (5) ensure that the decision is not arbitrary and capricious.

Wright v. Town of Matthews, 177 N.C. App. 1, 8, 627 S.E.2d 650, 656 (2006) (internal quotation marks omitted).

We agree with petitioner that while sitting as an appellate court, the superior court was without authority to “make additional findings.” *Batch v. Town of Chapel Hill*, 326 N.C. 1, 11, 387 S.E.2d 655, 662, *cert. denied*, 496 U.S. 931, 110 L. Ed. 2d 651 (1990); *see also Deffet Rentals, Inc. v. City of Burlington*, 27 N.C. App. 361, 364, 219 S.E.2d 223, 226 (1975) (“It is not the function of the reviewing court . . . to find the facts but to determine whether the findings of fact made by the Board are supported by the evidence before the Board and whether the Board made sufficient findings of fact.”). But we have also recognized that “a recitation of largely uncontroverted evidence” by a superior court in reviewing a local decision is not prejudicial error. *Cannon v. Zoning Bd. of Adjust. of Wilmington*, 65 N.C. App. 44, 47, 308 S.E.2d 735, 737 (1983). Although the superior court’s order contains 38 findings, those findings recite the council’s findings of fact and synthesize the evidence before the council. Therefore, the superior court’s inclusion of such findings within its order was not prejudicial error. *See id.*

In urging our review of two such findings, petitioner misapprehends the scope of our review. Our review is limited to determining “whether the trial court correctly applied the proper standard of review.” *Wright*, 177 N.C. App. at 8, 627 S.E.2d at 657. “[T]he question is not whether the evidence before the superior court supported that court’s order but whether the evidence before the town board was supportive of its action.” *Coastal Ready-Mix Concrete Co. v. Bd. of Comm’rs of Nags Head*, 299 N.C. 620, 626, 265 S.E.2d 379, 383, *reh’g denied*, 300 N.C. 562, 270 S.E.2d 106 (1980). Thus, we decline to consider whether the superior court’s findings are supported by competent evidence.

We further note that after careful examination of petitioner’s arguments on this issue, it appears petitioner’s challenge to what is labeled as the superior court’s Finding of Fact 34 is in substance a challenge to the council’s procedure. In Finding 34, the superior court listed the findings contained in the proposed motion the council voted to adopt. Petitioner’s argument is that “[n]o such motion was before the Council.” Thus, petitioner appears to challenge the council’s procedure, which requires *de novo* review. *Turik v. Town of Surf City*, 182 N.C. App. 427, 430, 642 S.E.2d 251, 253 (2007). However, even

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if we were to consider the substance of petitioner's argument, we note that we would nevertheless be precluded from reviewing it because petitioner failed to raise that issue in its petition for a writ of certiorari in the superior court, and we may only consider "those grounds for reversal or modification argued by the petitioner before the superior court." *Amanini v. N.C. Dep't of Human Res.*, 114 N.C. App. 668, 675, 443 S.E.2d 114, 118 (1994) (internal quotation marks omitted). Accordingly, we do not address this argument on appeal.

II.

[2] Petitioner's next argument is that the "Town's denial of the variance from the riparian buffer requirement was not supported on the record by competent, material, and substantial evidence." However, under this argument heading, the body of petitioner's brief mainly discusses how petitioner "demonstrated that its proposed development would satisfy all of the factors" of § 7.3.7. Petitioner again misapprehends the scope of this Court's review.

In examining either the sufficiency of the evidence or whether the board's decision was arbitrary and capricious, the trial court applies the whole record test. The whole record test requires the reviewing court to examine all the competent evidence . . . which comprises the whole record to determine if there is substantial evidence in the record to support the [quasi-judicial body's] findings and conclusions. The whole record test does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*.

Nw. Prop. Group, LLC v. Town of Carrboro, — N.C. App. —, —, 687 S.E.2d 1, 6 (2009) (internal citations and quotation marks omitted).

On several pages of its brief, petitioner urges this Court to review the record for evidence that its request for a variance should have been granted.² We decline to do so. *See id.* ("The whole record test does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views[.]"). Although petitioner also

2. Petitioner states that it "offered material, competent and substantial evidence establishing practical difficulties and unnecessary hardships, and the record contains evidence that supports the conclusion that [its] application should have been granted[.]" that it "established the existence of facts and conditions required for the approval of the [a]pplication[.]" and that its "[a]pplication demonstrated that its proposed development would satisfy all of the factors which are set forth in . . . 7.3.7."

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states that “[n]o evidence was presented to support any conclusion other than granting the [a]pplication,” petitioner fails to challenge any of the council’s findings as unsupported by competent evidence or to direct the Court to relevant pages in the record supporting this statement, and “[i]t is not the duty of this Court to supplement an appellant’s brief with legal authority or arguments not contained therein.” *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 606, 615 S.E.2d 350, 358, *superseedeas denied and disc. review denied*, 360 N.C. 63, 623 S.E.2d 582 (2005).

III.

[3] Finally, petitioner contends the council’s findings were “confusing” and “inconsistent” and prevent “adequate review by this Court.” Petitioner also contends the council “relied on evidence and factors not in the record or [in] its ordinance” in denying petitioner’s request for a variance. We disagree.

“Findings of fact are an important safeguard against arbitrary and capricious action by the Board of Adjustment because they establish a sufficient record upon which this Court can review the Board’s decision.” *Crist v. City of Jacksonville*, 131 N.C. App. 404, 405, 507 S.E.2d 899, 900 (1998). “[T]he Board must set forth the basic facts on which it relied with sufficient specificity to inform the parties, as well as the court, what induced its decision[.]” *Through The Looking Glass, Inc. v. Zoning Bd. of Adjust. for Charlotte*, 136 N.C. App. 212, 216, 523 S.E.2d 444, 447 (1999).

The council’s minutes contain the following proposed findings of fact, which the counsel adopted by a vote of four to one:

[T]he applicant proposes eliminating all zones of buffer in certain areas and impacting a total of 195, 508 square feet of buffer overall, approximately 4.5 acres, and has not shown an attempt to minimize the impact.

The applicant states that the need for the variance is driven by collector streets and design standard requirements; however, there is an opportunity to modify the collector street requirements which has not be pursued, and the applicant has not established which design standards are causing the need for encroachment. The buffer reduction is not appropriate until the measures have been taken, including any modifications to street requirements.

The applicant states that the buffer elimination reduction [sic] is required to meet higher density development and the required

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design criteria. However, there is no specific density of development that must be met by the applicant's development, and staff has developed concept plans to protect the buffer to a greater extent and meet these goals.

Applicant has presented evidence that it has obtained federal and state permits to impact streams, however, the permits do not address the concerns protected by the Town LDO.

The . . . [AACCP] shows significant buffer preservation and a concept that includes considerable preservation of buffer, taking into account road connections, and there is evidence that alternative designs were examined and do exist.

Applicant is not proposing mitigating meeting the requirements of the LDO. The mitigation areas identified by the applicant are areas that would be preserved in any event. The nitrogen reduction proposed by the applicant is a requirement under the other section of the LDO as indicated in the staff presentation.

The requested variance is not consistent with the spirit, purpose and intent of the LDO because it does not protect riparian buffers, and [sic] important resource to Cary. Further, it will not promote an appropriate balance between the built environment and the preservation of open space and natural environmental resources nor will it protect the high quality appearance, identity and character of Cary.

The requested variance is not consistent with the design guidelines because the applicant was involved in the [AACCP] approval process and was aware of the buffer requirements.

Applicant discusses poor soils but offers no evidence that poor soils caused the need for the buffer encroachment.

The above findings, which served as the basis for the council's denial of petitioner's variance request, are sufficient to inform this Court what induced the council's decision. *See id.* The superior court correctly applied *de novo* review to this issue, and we overrule petitioner's argument on this point.

Petitioner also argues that the council relied on matters outside the record in denying its request for a variance. Petitioner contends council member Portman "explicitly admitted that the basis for his motion to deny the Application was not based on whether Cary Creek met all of the requirements for a variance, but rather political con-

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siderations,” and points to Mr. Portman’s statement that “the reason that I made the motion is the precedent . . . as it relates to all of the other people who have respected riparian buffers. . . . I’m worried about a sense of fairness to those who have complied.” Petitioner also argues that the council’s decision was improperly based on the amount of acreage involved, unfairness to other developers, and mitigation.

Contrary to petitioner’s argument, § 7.3.7 required consideration of those matters. Section 7.3.7(A)(8) required that the council determine whether “[t]he requested variance . . . will preserve substantial justice.” The council was therefore permitted to consider whether it would be fair to other developers to grant the variance request. Several subsections of § 7.3.7(A) also required consideration of the size of land for which the applicant requests the variance. *See* Town of Cary, N.C., Land Development Ordinance §§ 7.3.7(A)(1)-(4), (6) (2006). Finally, § 7.3.7(A)(9) required that the council determine whether petitioner proposed mitigation. Petitioner’s contention that the council considered matters outside of the evidence and beyond the criteria of the ordinance is therefore without merit.

Affirmed.

Judges HUNTER and CALABRIA concur.

STATE OF NORTH CAROLINA v. FELICIA YVETTE CLAGON
AND KRISTEN RASHUNDA WILKINS

No. COA10-299

(Filed 5 October 2010)

1. Indictment and Information— first-degree burglary indictment—not defective

Defendant Wilkins’ argument that an indictment for first-degree burglary was defective because it failed to identify the specific intended felony upon which the burglary charge was based was overruled. An indictment for first-degree burglary satisfies the requirements of N.C.G.S. § 15A-924(a)(5) even if it does not specify the felony the defendant intended to commit.

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2. Burglary and Unlawful Breaking or Entering— first-degree burglary—sufficient evidence

The trial court did not err by denying defendant Clagon's motion to dismiss the charge of first-degree burglary because the evidence was sufficient to establish that defendant intended to commit assault with a deadly weapon inflicting serious injury upon entering the victim's residence.

3. Burglary and Unlawful Breaking or Entering— first-degree burglary—acting in concert—sufficient evidence

The trial court did not err by denying defendant Wilkins' motion to dismiss the charge of first-degree burglary. The evidence was sufficient to establish that the four perpetrators, including defendant Wilkins, entered the residence with a common plan or purpose and that defendant Clagon's assault was in pursuance of the common purpose or was a natural or probable consequence thereof.

4. Burglary and Unlawful Breaking or Entering— instructions— first-degree burglary—no plain error

The trial court's instruction to the jury regarding the specific intent element of first-degree burglary did not rise to the level of plain error. When viewed in its entirety, the trial court's instructions were clear that the underlying felony for the first-degree burglary charge was assault with a deadly weapon inflicting serious injury and not assault with a deadly weapon.

Appeal by defendants from judgments entered 18 August 2009 by Judge J. Richard Parker in Martin County Superior Court. Heard in the Court of Appeals 15 September 2010.

Attorney General Roy Cooper, by Assistant Attorneys General Scott K. Beaver and Richard Sowerby, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Kristen L. Todd, for defendant-appellant Felicia Yvette Clagon.

Irving Joyner, for defendant-appellant Kristen Rashunda Wilkins.

STEELMAN, Judge.

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Indictments for first-degree burglary are not required to specifically state the underlying felony on which the burglary charge is based. Where there was sufficient circumstantial evidence of Clagon's intent to commit assault with a deadly weapon inflicting serious injury, the trial court did not err in denying her motion to dismiss. For Wilkins to be guilty of first-degree burglary under an acting in concert theory, the State was not required to show that Wilkins had the specific intent that Clagon assault Forrest. When viewed in their entirety, the trial court's jury instructions were not error, much less plain error.

I. Factual and Procedural History

On 27 June 2007 Disherea Forrest ("Forrest"), Velencia Best, and Frushica Best were living together at 305 Nelson Street, Robersonville, North Carolina ("the residence"). At around 10:30 p.m. a burgundy car was observed driving back and forth in front of the residence. Eventually the car stopped and parked in front of the residence. The occupants of the car were later determined to be Kristen Wilkins ("Wilkins"), Felicia Clagon ("Clagon"), Antonio Freeman, Jeremy Freeman, and Timothy Andrews. Upon noticing that the burgundy car had stopped in front of their residence, Forrest and Best locked all three locks on their front door and went to the back room of the residence. They then heard a big boom and the front door burst open. Clagon and Wilkins entered followed by Jeremy and Antonio Freeman, both of whom were carrying guns. Clagon was carrying an ax, and walked towards the back of the residence asking "Where's Disherea [Forrest]?" Clagon located Forrest and began swinging the ax at her. A struggle ensued over the ax during which Forrest sustained a small laceration to her head. Clagon, Wilkins, Jeremy and Antonio Freeman all fled from the residence when someone said that the police were coming.

On 2 February 2009 Clagon and Wilkins were each indicted for first-degree burglary, assault with a deadly weapon inflicting serious injury, and two counts of assault by pointing a gun. At trial, all four counts of assault by pointing a gun were dismissed at the close of the evidence. The jury found Clagon and Wilkins guilty of first-degree burglary, but not guilty of assault with a deadly weapon inflicting serious injury. Clagon was sentenced to 60 to 81 months imprisonment, and Wilkins was sentenced to 51 to 71 months imprisonment.

Clagon and Wilkins appeal.

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II. Burglary Indictment

[1] In Wilkins' third argument, she contends that the indictment for first-degree burglary was defective because it failed to identify the specific intended felony upon which the burglary charge was based. We disagree.

N.C. Gen. Stat. § 15A-924(a)(5) (2007) states that a criminal pleading must contain:

A plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

The Supreme Court of North Carolina established in *State v. Worsley*, 336 N.C. 268, 280, 443 S.E.2d 68, 74 (1994), that an "indictment for first-degree burglary . . . satisfies the requirements of N.C.G.S. § 15A-924(a)(5), even [if] it does not specify the felony the defendant intended to commit . . ." The indictment in the instant case states:

The jurors for the State upon their oath present that . . . , [Wilkins] unlawfully, willfully and feloniously did during the nighttime between the hours of 10:00 p.m. and 11:00 p.m. break and enter the dwelling house of Valenzia Best and Fri-Shica Best [sic] located at 305 Nelson Street, Robersonville, NC. At the time of the breaking and entering, the dwelling house was actually occupied by Valenzia Best, Fri'Shica Best [sic], Shimere Keel, and Disherea Forrest. The defendant broke and entered with the intent to commit a felony therein.

The indictment,

charges the offense . . . in a plain, intelligible, and explicit manner and contains sufficient allegations to enable the trial court to proceed to judgment and to bar a subsequent prosecution for the same offense. The indictment also informs the defendant of the charge against him with sufficient certainty to enable him to prepare his defense.

Worsley, 336 N.C. at 281, 443 S.E.2d at 74 (internal quotations omitted). Wilkins' indictment for first-degree burglary in the instant case was sufficient to charge that crime.

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This argument is without merit.

III. Motion to Dismiss First-Degree Burglary Charge

[2] In Wilkins' first argument and Clagon's only argument, they contend the trial court committed reversible error by denying their motions to dismiss the charges of first-degree burglary because the evidence was insufficient to establish that they intended to commit assault with a deadly weapon inflicting serious injury upon entering the residence. We disagree.

A. Standard of Review

The standard of review on a motion to dismiss is "whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992).

Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. In ruling on a motion to dismiss, the trial court must examine the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference and intendment that can be drawn therefrom.

Id. (citations omitted).

B. Charge Against Clagon

The elements of first-degree burglary are: "(1) the breaking (2) and entering (3) in the nighttime (4) into a dwelling house or a room used as a sleeping apartment (5) of another (6) which is actually occupied at the time of the offense (7) with the intent to commit a felony therein." *State v. Blyther*, 138 N.C. App. 443, 447, 531 S.E.2d 855, 858 (2000) (citation omitted), *disc. review denied*, 352 N.C. 592, 544 S.E.2d 788 (2000). Defendants' only argument pertains to the seventh element, involving their intent to commit a felony.

"Intent being a mental attitude, it must ordinarily be proven, if proven at all, by circumstantial evidence, that is, by proving facts from which the fact sought to be proven may be inferred." *State v. Smith*, 211 N.C. 93, 95, 189 S.E. 175, 176 (1937). "[E]vidence of what a defendant does after he breaks and enters a house is evidence of his intent at the time of the breaking and entering." *State v. Gray*, 322 N.C. 457, 461, 368 S.E.2d 627, 629 (1988). Upon entering the residence, carrying an ax, Clagon asked "Where's Disherea [Forrest]?" and upon

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locating Forrest began swinging the ax at her. This was sufficient circumstantial evidence to survive Clagon's motion to dismiss, and submit the issue of Clagon's intent to the jury.

This argument is without merit.

C. Charges Against Wilkins

[3] Wilkins was convicted of first-degree burglary under a theory of acting in concert. Wilkins argues, without citation of any authority, that “[i]n order to support the jury’s verdict, the State’s evidence would have had to shown [sic] that Appellant had a specific intent that Clagon would assault Forrest with a deadly weapon and that this assault was specifically meant to produce serious injury.”

Acting in concert occurs when:

two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose . . . or as a natural or probable consequence thereof.

State v. Barnes, 345 N.C. 184, 233, 481 S.E.2d 44, 71 (1997) (citation and quotation omitted), *cert. denied*, 522 U.S. 876, 139 L. Ed. 2d 134 (1997), *cert. denied*, 523 U.S. 1024, 140 L. Ed. 2d 473 (1998). “Our Supreme Court has expressly rejected the concept that for a defendant to be convicted of a crime under an acting in concert theory, he must possess the *mens rea* to commit that particular crime.” *State v. Bellamy*, 172 N.C. App. 649, 668, 617 S.E.2d 81, 95 (2005) (citations omitted), *disc. review denied, appeal dismissed*, 360 N.C. 290, 628 S.E.2d 384(2006). Under *Barnes*, the crime must be committed “in pursuance of the common purpose . . . or as a natural or probable consequence thereof.” *Barnes*, 345 N.C. at 233, 481 S.E.2d at 71. The critical question is whether the crimes committed are a foreseeable outgrowth of the common plan. *Bellamy*, 172 N.C. App. at 668, 617 S.E.2d at 94. “[T]he issue does not turn on the defendant’s subjective state of mind, but depends upon whether, under all of the circumstances presented, a reasonable person in the defendant’s position would have or should have known that the charged offense was a reasonably foreseeable consequence of the principal crime.” *Id.* at 668, 617 S.E.2d at 94-95 (quotation omitted).

The State’s evidence showed that Wilkins forcibly entered the residence with two men carrying guns and with Clagon who was car-

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rying an ax and asking “Where’s Disherea [Forrest]?” Clearly the four people entered the residence with a common purpose. Based upon the conduct and statements of Clagon upon entering the residence, there was sufficient circumstantial evidence that Clagon’s assault on Forrest was in “pursuance of a common purpose . . . or as a natural or probable consequence thereof.” *Barnes*, 345 N.C. at 233, 481 S.E.2d at 71. The trial court did not err in denying Wilkins’ motion to dismiss.

This argument is without merit.

III. Jury Instruction

In Wilkins’ second argument, she contends that the trial court erred by giving a flawed instruction to the jury regarding the specific intent element of first-degree burglary. We disagree.

A. Standard of Review

Wilkins failed to object to the jury instructions at trial; therefore, this argument will be reviewed for plain error only. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). The trial court will only be overturned under plain error review when “the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done.” *Id.* (quotation omitted). When reviewing the jury instruction for plain error the instruction must be reviewed as a whole, in its entirety. *Id.*

B. Analysis

[4] Wilkins’ contends that the trial court erred when instructing the jury as to the intent element of first-degree burglary. The trial court stated that to satisfy the intent element of first-degree burglary the jury had to find “that at the time of the breaking and entering the defendant intended to commit assault with a deadly weapon, as that charge has previously been defined to you, within the dwelling house.” Wilkins contends that the trial court instructed the jury that it could convict her of first-degree burglary based upon an intent to commit assault with a deadly weapon, a misdemeanor, rather than assault with a deadly weapon inflicting serious injury, a felony.

When considered in light of the jury instruction as a whole this did not rise to the level of plain error. The trial court specifically referred back to its prior instructions on assault with a deadly weapon inflicting serious injury. This instruction was as follows:

The defendants have been charged with assault with a deadly weapon inflicting serious injury. For you to find either or both of

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these defendants guilty of this offense, the State must prove three things beyond a reasonable doubt: first, the defendants assaulted the victim by intentionally striking the victim with a hatchet; second, that the defendants used a deadly weapon. . . . [A]nd, third, that the defendant inflicted serious injury upon the victim.

We further note that in both the preamble and mandate portions of the jury instructions on the offense of first-degree burglary the court referred to intent to commit assault with a deadly weapon inflicting serious injury. When viewed in its entirety, the trial court's instructions to the jury were clear that the underlying felony for the first-degree burglary charge was assault with a deadly weapon inflicting serious injury and not assault with a deadly weapon. The trial court's instructions were not in error, much less plain error.

This argument is without merit.

NO ERROR.

Judges BRYANT and BEASLEY concur.

TRIAD WOMEN'S CENTER, P.A., PLAINTIFF v. TOSHA L. ROGERS, DEFENDANT

No. COA09-1272

(Filed 5 October 2010)

Appeal and Error— interlocutory order—award of attorney fees—amount to be determined

An appeal from an award of attorney fees may not be brought until the trial court has finally determined the amount to be awarded unless appellant makes a showing that waiting for the final determination would affect a substantial right. Here, the appeal from an interlocutory order did not affect a substantial right and was dismissed.

Appeal by defendant from order entered 11 June 2009 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 23 March 2010.

Robert E. Boydoh, Jr. and Angela Bullard Fox for plaintiff-appellee.

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Penry Riemann PLLC, by Rolly L. Chambers, for defendant-appellant.

GEER, Judge.

Defendant Tosha L. Rogers appeals from the trial court's order granting summary judgment to plaintiff Triad Women's Center, P.A. The order also stated that it was awarding plaintiff attorneys' fees, but reserved for further hearing the issue of the amount of fees to be awarded. Defendant appealed prior to the trial court's entering any order finalizing the award of attorneys' fees. On appeal, defendant challenges only the decision to award fees and not the trial court's determination that plaintiff was entitled to summary judgment. Since there has been no final decision on the attorneys' fees issue, this appeal, limited to the propriety of an award of fees, is interlocutory. Despite the interlocutory nature of the appeal, defendant makes no argument as to the existence of a substantial right that will be lost absent immediate review. We, therefore, dismiss defendant's appeal.

Facts

On 19 May 2007, plaintiff and defendant entered into an employment agreement in which defendant agreed to work for plaintiff as a physician in its obstetrics and gynecology medical practice. Section 3.1(e) of the agreement provided that plaintiff could at any time terminate defendant's employment for cause, including, but not limited to, acts considered "materially adverse to the best financial interests" of plaintiff.

If defendant's employment was terminated, section 1.6 of the agreement required her to purchase, at defendant's own expense, continuing coverage for any liability directly or indirectly resulting from acts or omissions occurring during the term of the agreement. This coverage ("tail insurance coverage") was required to be obtained through an extended reporting endorsement to the existing insurance policy maintained by plaintiff and to name plaintiff as an additional certificate holder. The endorsement would extend the period of time that the insurance company would cover claims arising out of services rendered by defendant while employed by plaintiff but not yet reported to the insurance company at the time of the termination of defendant's employment.

The agreement further specified that if defendant did not provide plaintiff with a certificate confirming she had purchased this cover-

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age, plaintiff could purchase the coverage using any money due defendant. If no money was due defendant, plaintiff was entitled to seek reimbursement from defendant.

Defendant began work on 1 August 2007. By letter dated 6 May 2008, defendant gave plaintiff 60-days notice, pursuant to the agreement, that she would be resigning from the medical practice. Defendant stated that her resignation was “due to differences in practice style and philosophy” that were “too vast for the patients to receive an adequate standard of care.” Defendant wrote: “I feel as though the patient should be the most important aspect of patient care. The good of the patient should supersede the good of the staff or the good of the practice.” This letter was copied to David Moore, M.D., Chief of Staff at High Point Regional Hospital.

On 23 May 2008, Dr. Elaine Greene, plaintiff's President, called defendant to inform her that her employment was being immediately terminated for cause due to the statements defendant made to High Point Regional Hospital in the 6 May 2008 letter. Dr. Greene explained that those statements were “materially adverse to the interest of the company” and that, pursuant to the agreement, defendant was required to purchase tail insurance coverage. That same day, Dr. Greene mailed to defendant's home address written notice of the termination of defendant's employment and a reminder of her obligation to obtain tail insurance coverage.

By letter dated 12 June 2008, plaintiff's legal counsel also notified defendant of her obligation to obtain tail insurance coverage and advised her that if she did not obtain the coverage by 30 June 2008, plaintiff would purchase it on her behalf. On 19 June 2008, defendant sent plaintiff a “Certificate of Liability Insurance” that had been issued by her new employer's insurance company. That “Certificate of Liability Insurance” was determined to be inadequate verification of insurance coverage for plaintiff because plaintiff “was not named in the Certificate as an insured or an additional insured.”

On 30 June 2008, plaintiff's legal counsel sent another letter to defendant notifying her that because she had not provided evidence that she had purchased tail insurance coverage, plaintiff had purchased it on her behalf. The letter stated that plaintiff was giving defendant five days to reimburse plaintiff in full for the insurance premium, or plaintiff would institute a lawsuit to recover the premium, interest, court costs, and attorneys' fees.

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On 17 September 2008, plaintiff filed suit against defendant in Guilford County Superior Court, seeking \$6,904.00 in reimbursement for the cost of the tail insurance coverage plus interest and reasonable attorneys' fees pursuant to N.C. Gen. Stat. § 6-21.5 (2009), as provided in the employment agreement. Defendant filed an answer on 23 October 2008, and, on 31 October 2008, an amended answer and counterclaim for breach of contract, seeking \$26,666.00 for lost wages.

On 6 May 2009, plaintiff moved for summary judgment. On 11 June 2009, the trial court entered an order granting plaintiff's motion for summary judgment as to both plaintiff's claim and defendant's counterclaim and awarding plaintiff "the sum of \$6,904.00, plus interest at the legal rate from June 30, 2008 until paid, together with the costs of this action, including reasonable attorney's fees to be determined by the Court[.]" Defendant filed notice of appeal on 10 July 2009 prior to the trial court's making any further determination regarding attorneys' fees. On 30 December 2009, plaintiff filed a motion to dismiss defendant's appeal, contending that the trial court's order is interlocutory and not immediately appealable.

Discussion

"An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). There is no right to immediately appeal an interlocutory order except in two instances: "(1) the order is final as to some claims or parties, and the trial court certifies pursuant to N.C.G.S. § 1A-1, Rule 54(b) that there is no just reason to delay the appeal, or (2) the order deprives the appellant of a substantial right that would be lost unless immediately reviewed." *Currin & Currin Constr., Inc. v. Lingerfelt*, 158 N.C. App. 711, 713, 582 S.E.2d 321, 323 (2003) (quoting *Myers v. Mutton*, 155 N.C. App. 213, 215, 574 S.E.2d 73, 75 (2002), *appeal dismissed and disc. review denied*, 357 N.C. 63, 579 S.E.2d 390 (2003)).

Here, the trial court's order granting summary judgment awarded "reasonable attorney's fees to be determined by the Court." (Emphasis added.) Since, as of the appeal, the issue of the amount of fees to be paid still remained pending, the order granting summary judgment is interlocutory. See *Hoke County Bd. of Educ. v. State*, — N.C. App. —, —, 679 S.E.2d 512, 515-16 (holding that order leaving open issue whether costs should be awarded was "interlocutory in nature" and appeal, therefore, was not properly before Court), *disc.*

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review denied, 363 N.C. 653, 686 S.E.2d 515 (2009). The summary judgment order does not include any Rule 54(b) certification, and defendant has made no argument that the order affects a substantial right that will be lost without an immediate appeal. Indeed, defendant's Statement of the Grounds for Appellate Review states in its entirety: "This appeal lies from a final decision of the Superior Court of Guilford County pursuant to N.C. Gen. Stat. §7A-27(b)."

In response to plaintiff's motion to dismiss the appeal, defendant relies upon *In re Will of Harts*, 191 N.C. App. 807, 664 S.E.2d 411 (2008). That decision was, however, subsequently limited by this Court in *Webb v. Webb*, 196 N.C. App. 770, 774, 677 S.E.2d 462, 465 (2009) ("*Harts* did not hold that an interlocutory order, entered before the trial court rules on a pending motion for attorney's fees, is immediately appealable. Nor does *Harts* suggest that a pending motion for attorney's fees does not count in determining whether an order is interlocutory."). In any event, it is questionable whether either opinion continues to be controlling authority given our Supreme Court's decision in *Bumpers v. Cmty. Bank of N. Virginia*, 364 N.C. 195, 203, 695 S.E.2d 442, 447-48 (2010) (rejecting case-by-case approach followed in *Webb* and *Harts* in favor of "bright-line rule").

We need not, however, resolve the current state of the law under *Bumpers*, *Webb*, and *Harts* because none of those cases is pertinent to this appeal. While those opinions would be relevant if defendant were challenging on appeal whether the trial court should have granted summary judgment on plaintiff's claim and defendant's counterclaim, defendant's appeal relates only to the propriety of the award of attorneys' fees. She included only two Questions Presented in her brief:

- I. DID THE TRIAL COURT ERR IN AWARDING ATTORNEY'S FEES TO THE PLAINTIFF WHERE THERE WAS NO STATUTORY AUTHORITY FOR SUCH AN AWARD?
- II. DID THE TRIAL COURT ERR IN AWARDING ATTORNEY'S FEES TO THE PLAINTIFF WHERE THERE WAS NO BASIS FOR SUCH AN AWARD UNDER THE TERMS OF THE EMPLOYMENT AGREEMENT IN DISPUTE?

Even if we consider the decision to grant summary judgment to be a final judgment—which may have been certifiable under Rule 54(b) pursuant to *Bumpers*—there can be no question that no final decision has yet been rendered as to plaintiff's request for attorneys' fees.

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As our Supreme Court recently reminded us, “[t]he appeals process ‘is designed to eliminate the unnecessary delay and expense of repeated fragmentary appeals, and to present the whole case for determination in a single appeal from the final judgment.’” *Stanford v. Paris*, — N.C. —, —, — S.E.2d —, —, 2010 WL 3366720, *4, 2010 N.C. LEXIS 581, *11 (Aug. 27, 2010) (quoting *City of Raleigh v. Edwards*, 234 N.C. 528, 529, 67 S.E.2d 669, 671 (1951)) (holding that party may appeal order affecting substantial right, but is not required to do so). Here, if we were to allow this appeal, we would be required to visit the attorneys’ fees issue twice: one appeal addressing, in the abstract, whether plaintiff may recover attorneys’ fees at all and, if we upheld the first order, a second appeal addressing the appropriateness of the actual monetary award. Allowing a single issue, such as attorneys’ fees, to be split in two gives rise to precisely the unnecessary delay and expense mentioned in *Stanford*.

We recognize that the potential for dismissal of an appeal as untimely is a risk that forces attorneys to err on the side of caution for fear of depriving their clients of an appeal. We also recognize that the law in this area has not always been a model of clarity. We, therefore, specifically hold that an appeal from an award of attorneys’ fees may not be brought until the trial court has finally determined the amount to be awarded. For this Court to have jurisdiction over an appeal brought prior to that point, the appellant would have to show that waiting for the final determination on the attorneys’ fees issue would affect a substantial right. Because (1) defendant’s appeal relates only to the issue of attorneys’ fees, and the trial court has not yet entered an order finally deciding that issue, and (2) defendant has not argued that a substantial right is affected, we dismiss the appeal as interlocutory.

Dismissed.

Judges McGEE and ERVIN concur.

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[207 N.C. App. 359 (2010)]

STATE OF NORTH CAROLINA, BY AND THROUGH ITS CARTERET COUNTY CHILD SUPPORT ENFORCEMENT OFFICE, *EX REL.*, BURNICE BOGGS, PETITIONER V. TYRONE DAVIS, RESPONDENT

No. COA10-163

(Filed 5 October 2010)

1. Jurisdiction— subject matter jurisdiction—interstate child support petition—two dismissal rule inapplicable

The trial court erred in finding and concluding that petitioner voluntarily gave notice of dismissal on two separate occasions, which operated as an adjudication on the merits pursuant to Rule 41 of the North Carolina Rules of Civil Procedure, and in dismissing the petition for lack of subject matter jurisdiction. Rule 41 was not implicated where petitioner voluntarily dismissed the action on one occasion but the second dismissal was entered by order of the court granting respondent's motion to dismiss.

2. Appeal and Error— defense of laches—not plead before the trial court

Respondent's argument that the trial court did not err in dismissing petitioner's interstate petition for child support based on the doctrine of laches was dismissed where respondent did not plead the defense of laches before the trial court.

3. Child Custody and Support— interstate child support petition—verification

Respondent's argument that the trial court did not err in dismissing petitioner's interstate petition for child support based on petitioner's failure to verify the petition in accordance with N.C.G.S. § 52C-3-310 was overruled because there was no authority requiring a notary public commissioned in Louisiana to print or type his name to verify a petition for child support.

Appeal by the State of North Carolina on behalf of petitioner from order entered 18 September 2009 by Judge Paul Quinn in Carteret County District Court. Heard in the Court of Appeals 1 September 2010.

Attorney General Roy Cooper, by Special Deputy Attorney General Gerald K. Robbins, for the State.

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Valentine & McFayden, P.C., by Stephen M. Valentine, for respondent-appellee.

BRYANT, Judge.

Where a petitioner voluntarily dismissed the action on one occasion and where another dismissal was entered by order of the court granting respondent's motion to dismiss, the "two dismissal" provision of Rule 41(a) was not implicated, and the trial court erred in concluding the two dismissal rule applied to bar petitioner's action. Therefore, we reverse.

On 4 October 2001, in docket number 01 CVD 1146, Donna Chenevert, resident of Houma, Louisiana, filed with the Carteret County Clerk of Superior Court an interstate child support petition and summons for respondent Tyrone Davis, a resident of Beaufort, North Carolina. Chenevert is the mother of the juvenile for whom support is sought. Respondent acknowledges that this summons was served on him on 11 October 2001; however, no further action was taken. On 19 March 2002, Chenevert filed an amended petition and a second summons was issued to respondent with the file number 01 CVD 1146. On 29 May 2002, respondent filed a motion to dismiss petition 01 CVD 1146 alleging the summons was not served in accordance with Rule 4 of the North Carolina Rules of Civil Procedure. After a 22 August 2002 hearing, the Carteret County District Court entered an order on 20 November 2002, *nunc pro tunc* 22 August 2002, decreeing that respondent was not properly served with process; thus, the trial court lacked personal jurisdiction, and "[i]t is therefore ordered adjudged and decreed that this case is hereby dismissed without prejudice."

Following the 22 August 2002 hearing, respondent was ordered to remain in the courtroom until the Carteret County District Court Clerk issued to respondent another summons. This summons again referenced docket number 01 CVD 1146. On 1 November 2002, respondent filed a motion to dismiss petition 01 CVD 1146 alleging the summons served on 22 August 2002 was invalid for failing to comply with North Carolina Rules of Civil Procedure, Rule 4(d)(1) or (2). The matter was called for hearing on 13 March 2003. Almost a year later, on 11 March 2004, *nunc pro tunc* 13 March 2003, the trial court entered an order denying respondent's motion to dismiss. On 24 June 2004, Chenevert filed a voluntary dismissal of her petition.

On 12 October 2007, the Carteret County District Court Deputy Clerk issued to respondent a summons under docket number 07 CVD

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1166. This action was filed by petitioner Burnice Boggs, grandmother and caretaker of Chenevert's minor child and also a resident of Houma, Louisiana. On 3 December 2007, respondent filed a motion to dismiss alleging: (1) lack of subject matter jurisdiction; (2) lack of personal jurisdiction; (3) failure to include a birth certificate as mandated by N.C. Gen. Stat. § 49-14(a); (4) failure to complete the petition sufficiently to determine if petitioner has standing; and (5) failure to verify the petition. A hearing on the matter was held 2 April 2008.

On 18 September 2009, *nunc pro tunc* 3 April 2008, the trial court entered an order stating the following conclusions:

1. Since the proceeding designated 01 CvD-1146 has previously been dismissed at least two times, said dismissal [acts] as an adjudication on the merits as provided in Rule 41(a)(1).
2. As a result of said adjudication on the merits this court does not have jurisdiction over this proceeding and this case should be dismissed in accordance with Rule 12(b)(1).

The State of North Carolina, through its agent, the Carteret County Child Support Enforcement Office, on behalf of petitioner Burnice Boggs, appeals.

Standard of Review

"Rule 12(b)(1) of the Rules of Civil Procedure allows for dismissal based upon a trial court's lack of jurisdiction over the subject matter of the claim." *Welch Contracting, Inc. v. N.C. DOT*, 175 N.C. App. 45, 50, 622 S.E.2d 691, 694 (2005) (citing N.C. Gen. Stat. § 1A-1, Rule 12). "[T]he standard of review on a motion to dismiss under Rule 12(b)(1) for lack of jurisdiction is *de novo*." *State ex rel. Cooper v. Seneca-Cayuga Tobacco Co.*, — N.C. App. —, —, 676 S.E.2d 579, 583 (2009) (citation omitted).

Analysis

[1] On appeal, the State argues the trial court erred in finding and concluding petitioner voluntarily gave notice of dismissal on two separate occasions operating as an adjudication on the merits pursuant to the North Carolina Rules of Civil Procedure, Rule 41. Therefore, it was error to dismiss the petition for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). We agree.

North Carolina General Statutes, section 1A-1, Rule 41, dismissal of actions, in pertinent part, provides:

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[A]n action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case . . . Unless otherwise stated in the notice of dismissal . . . the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this or any other state or of the United States, an action based on or including the same claim.

N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (2009). “The ‘two dismissal’ rule has two elements: (1) the *plaintiff* must have filed two notices to dismiss under Rule 41(a)(1)[,] and (2) the second action must have been based on or included the same claim as the first action.” *Dunton v. Ayscue*, — N.C. App. —, —, 690 S.E.2d 752, 753 (2010) (citing *City of Raleigh v. College Campus Apartments, Inc.*, 94 N.C. App. 280, 282, 380 S.E.2d 163, 165 (1989), *aff’d per curiam*, 326 N.C. 360, 388 S.E.2d 768 (1990)) (emphasis added). “[I]n enacting the two dismissal provision of Rule 41(a)(1), the legislature intended that a second dismissal of an action asserting claims based upon the same transaction or occurrence as a previously dismissed action would operate as an adjudication on the merits and bar a third action based upon the same set of facts.” *Id.* However, “[t]he ‘second dismissal’ rule does not apply to make voluntary dismissals by stipulation or by order of [the] court ‘on the merits’, [sic] though preceded by a prior voluntary dismissal.” *Parrish v. Uzzell*, 41 N.C. App. 479, 483, 255 S.E.2d 219, 221 (1979) (holding the “two dismissal rule” was authorized solely under G.S. 1A-1, Rule 41(a)(1)(i)); *see also N.C. R.R. Co. v. Ferguson Builders Supply, Inc.*, 103 N.C. App. 768, 407 S.E.2d 296 (1991) (holding the second dismissal was by order of the trial court; therefore, the “two dismissal” rule did not apply). “The two-dismissal rule . . . applies only when the plaintiff has twice dismissed an action based on . . . the same claim.” *Hopkins v. Ciba-Geigy Corp.*, 111 N.C. App. 179, 182, 432 S.E.2d 142, 144 (1993) (citation omitted).

Here, the trial court concluded that “[s]ince the proceeding designated 01 CVD 1146 has previously been dismissed at least two times, said dismissal [acted] as an adjudication on the merits as provided in Rule 41(a)(1).” However, the record reflects that petitioner only filed one voluntary dismissal of the petition (on 24 June 2004). On 20 November 2002, *nunc pro tunc* 22 August 2002, it was the trial court that entered an order dismissing petitioner’s action after making the determination that it lacked personal jurisdiction and stating “[a]ccordingly, *respondent’s* motion [to dismiss the petition] should be granted.”

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(Emphasis supplied). Such is not a voluntary dismissal authorized by petitioner under Rule 41(a)(1)(i). See *Parrish*, 41 N.C. App. 479, 255 S.E.2d 219. Therefore, petitioner's action is not barred by the "two dismissal rule" pursuant to Rule 41(a)(1)(i). See also *N.C. R.R. Co.*, 103 N.C. App. 768, 407 S.E.2d 296.

[2] Respondent argues in the alternative that the trial court did not err in dismissing the petition based on the doctrine of laches and for petitioner's failure to verify the petition in accordance with N.C. Gen. Stat. § 52C-3-310.

The "[the doctrine of] laches is an affirmative defense. It must be pleaded and the burden of proof is on the party who pleads it." *Taylor v. Raleigh*, 290 N.C. 608, 622, 227 S.E.2d 576, 584 (1976) (citing *Poultry Co. v. Oil Co.*, 272 N.C. 16, 22, 157 S.E.2d 693, 698 (1967)). However, our Supreme Court has long held where a theory argued on a appeal was not raised before the trial court the argument is deemed waived on appeal. See *State v. Augustine*, 359 N.C. 709, 721, 616 S.E.2d 515, 525 (2005) (quoting *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934))) ("where a theory argued on appeal was not raised before the trial court, 'the law does not permit parties to swap horses between courts in order to get a better mount'"); see also N.C. R. App. P. 10(b)(1) (2009). Here, respondent did not plead the defense of laches before the trial court; therefore, we will not address it.

[3] Next, respondent argues that petitioner failed to verify her petition in accordance with N.C. Gen. Stat. § 52C-3-310. Specifically, respondent argues that petitioner's petition for support does not use the words "sworn to" or "oath" on the petition's verification page and the person before whom the petitioner allegedly signed her name is not discernable.

Under North Carolina General Statutes, section 52C-3-310(a), "[a] petitioner seeking to establish or modify a support order or to determine parentage in a proceeding under this Chapter must verify the petition." N.C.G.S. § 52C-3-310(a) (2009).

[T]he General Assembly has expressly provided that pleadings may be verified by notaries public from other jurisdictions, see N.C. Gen. Stat. § 1-148, it has further provided that a notarial act "performed in another jurisdiction in compliance with the laws of that jurisdiction is valid to the same extent as if it had been performed by a notary commissioned under [our Notary Public Act] if . . . performed by . . . any person authorized to perform notarial acts in that jurisdiction."

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State ex rel. Johnson v. Eason, — N.C. App. —, —, 679 S.E.2d 151, 153 (2009) (citing N.C. Gen. Stat. § 10B-20(f) (2007)). Under Louisiana Revised Statutes, Title 13, Support of Family, article 1303.11(A), “[a] petitioner seeking to establish or modify a support order or to determine parentage in a proceeding under this Chapter must verify the petition.” La. R.S. § 1303.11(A) (2009). Respondent does not direct this Court to any authority, and we do not find any, requiring a notary public commissioned in Louisiana to print or type his or her name to verify a petition for child support. Moreover, contrary to respondent’s allegations, the verification page challenged clearly states next to the notary’s signature the verification was “Sworn to and Signed Before Me This Date, County/State.” Accordingly, respondent’s arguments are dismissed in part and overruled in part.

Reversed.

Judges STEELMAN and BEASLEY concur.

LUIS CASTANEDA VALENZUELA, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF NERY CASTANEDA VALENZUELA, DECEASED, PLAINTIFF V. PALLET EXPRESS, INC., MARK SHROPSHIRE, INDIVIDUALLY, AND MICHAEL BRIGGS, INDIVIDUALLY,
DEFENDANTS

No. COA10-87

(Filed 5 October 2010)

**Workers’ Compensation— Woodson and Pleasant exceptions—
evidence not sufficient**

Summary judgment was correctly granted for an employer and co-worker defendants on wrongful death claims brought under the *Woodson* and *Pleasant* exceptions to the exclusivity provisions of the Workers’ Compensation Act. Plaintiff did not forecast evidence that defendants knew that their actions were substantially certain to cause serious injury or death, and there was evidence that one of the defendants had been hired after a safety guard had been removed from a shredder and was not aware of the increased danger.

Appeal by plaintiff from judgment entered 10 July 2009 by Judge Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 15 September 2010.

VALENZUELA v. PALLET EXPRESS, INC.

[207 N.C. App. 364 (2010)]

Mauriello Law Offices, P.C., by Christopher D. Mauriello, and Leslie C. Rawls for plaintiff-appellant.

Teague Campbell Dennis & Gorham, L.L.P., by J. Matthew Little and Rebecca A. Rausch, for defendant-appellee Pallet Express, Inc.

Tuggle, Duggins & Meschan, P.A., by Jeffery S. Southerland, for defendants-appellees Mark Shropshire and Michael Briggs.

BRYANT, Judge.

Where the personal representative of the estate of an employee killed in a workplace accident failed to forecast evidence which would support his wrongful death claims under the *Woodson* and *Pleasant v. Johnson* exceptions to the exclusivity provisions of the Worker's Compensation Act, the trial court's grant of summary judgment to employer and co-worker defendants was proper.

Facts

This case arises from a wrongful death lawsuit. Seventeen-year-old Nery Castaneda Valenzuela was killed on 2 October 2007, while working for defendant Pallet Express, Inc. Defendant Michael Briggs is president of Pallet Express, and defendant Mark Shropshire is the company's operations manager. Nery was a Guatemalan national working legally in the United States. At the time of his death, Nery had been working for Pallet Express for about four months.

On the day of his death, Nery was working at a pallet shredder with another employee, Ricardo Callazon. The supervisor of the shredder was late for work and was not present at the time Nery was killed. The pallet shredder is a large machine with a shaker table onto which pallets are placed. The shaker table feeds pallets into a crushing chamber of four large ridged hammers which grind the pallets into mulch. Shortly after they began work at the shredder, Callazon left the machine to get a forklift. Nery was last seen working in the staging area next to the shaker table. When Callazon returned to the shredder, Nery was not there. His remains were found on the discharge side of the shredder shortly thereafter. The North Carolina Occupational Safety and Health Administration (NCOSHA) conducted an investigation of the incident and issued two citations listing eleven safety violations to Pallet Express. Among the offenses cited were allowing an underage employee to work on heavy equipment and removing safety guards from the shredder.

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[207 N.C. App. 364 (2010)]

Plaintiff Luis Castenada Valenzuela, in his capacity as personal representative of Nery's estate, filed a wrongful death complaint against defendants on 30 September 2008. On 26 May 2009, defendants moved for summary judgment, alleging that plaintiff was unable to meet his burden of proof because no one witnessed the accident. On 10 July 2009, the trial court granted summary judgment to defendants. Plaintiff appeals.

On appeal, plaintiff presents a single argument: that the trial court erred in granting summary judgment to defendants because genuine issues of material fact existed.

Standard of Review

We review a trial court's grant of summary judgment de novo. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that [a] party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2010). Thus, "[o]n appeal of a trial court's allowance of a motion for summary judgment, we consider whether, on the basis of materials supplied to the trial court, there was a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law." *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003). "Evidence presented by the parties is viewed in the light most favorable to the non-movant." *Id.* (citation omitted).

Analysis

Plaintiff argues that the trial court's grant of summary judgment to defendants was error because the evidence presented a genuine issue of fact as to whether defendants engaged in intentional misconduct substantially certain to cause Nery's death. We disagree.

Generally, employees who are injured or killed at work are limited to recovery as specified under the North Carolina Worker's Compensation Act. N.C. Gen. Stat. § 97-10.1 (2010). However, we recognize an exception to the exclusivity provisions of the Act "where an employee is injured or killed as a result of the intentional misconduct of the employer." *Whitaker v. Town of Scotland Neck*, 357 N.C. 552, 556, 597 S.E.2d 665, 667 (2003) (citing *Pleasant v. Johnson*, 312 N.C. 710, 713, 325 S.E.2d 244, 247 (1985), *reh'ing denied*, 358 N.C. 159, 593 S.E.2d 591 (2004)). In *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d

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222 (1991), “this Court slightly expanded this exception to include cases in which a defendant employer engaged in conduct that, while not categorized as an intentional tort, was nonetheless substantially certain to cause serious injury or death to the employee.” *Whitaker*, 357 N.C. at 556, 597 S.E.2d at 667. “In such cases, the injured employee may proceed outside the exclusivity provisions of the Act and maintain a common law tort action against the employer.” *Id.* at 556, 597 S.E.2d at 667-68 (citation omitted). While acknowledging these exceptions, our Supreme Court has cautioned that they apply “only in the most egregious cases of employer misconduct. Such circumstances exist where there is uncontroverted evidence of the employer’s intentional misconduct and where such misconduct is substantially certain to lead to the employee’s serious injury or death.” *Id.* at 557, 597 S.E.2d at 668.

Plaintiff made *Woodson* claims against Pallet Express and defendant Briggs, and a *Pleasant v. Johnson* claim for co-worker liability against defendant Shropshire. Plaintiff asserts that the record here forecasts evidence which would permit a jury to find that defendants’ conduct would sustain his *Woodson* claims. Specifically, plaintiff contends that Pallet Express and Briggs: 1) removed safety guards from the shredder which sacrificed employee safety for increased production; 2) assigned an underage employee to work on heavy equipment in violation of State and federal law; 3) failed to provide Nery with proper training on the shredder; and 4) failed to ensure that trained personnel were present when the shredder was operated.

As to plaintiff’s *Woodson* claims, we find the facts of *Kolbinsky v. Paramount Homes, Inc.*, 126 N.C. App. 533, 485 S.E.2d 900, *disc. review denied*, 347 N.C. 267, 493 S.E.2d 457 (1997), closely analogous to those here. *Kolbinsky* concerned *Woodson* claims by Matthew Kolbinsky, a seventeen-year-old unskilled temporary construction helper who “severed a portion of his left hand while cutting plywood with a circular saw.” *Id.* at 534, 485 S.E.2d at 901. “The record reveal[ed] that the safety guard had been removed from the saw.” *Id.* In affirming the trial court’s grant of summary judgment to defendants, we held that

the evidence considered in the light most favorable to [the] plaintiffs, shows that the employer was aware that the guard had been removed from the circular saw; the removal of the guard is a violation of OSHA regulations; the employer allowed Matthew to use the saw despite the removal of the guard; the employer may have been aware that Matthew was a minor; and the employment of a

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minor as an operator of a circular saw is a violation of child labor regulations. . . . [T]he evidence fails to show that the employer knew that its misconduct was substantially certain to cause serious injury and was so egregious as to be tantamount to an intentional tort. Therefore, we conclude that [the] plaintiffs failed to produce evidence to support an essential element of a *Woodson* claim. Accordingly, we hold that the trial court properly granted summary judgment to [the] defendants.

Id. at 535-36, 485 S.E.2d at 902 (citing *Pendergrass v. Card Care, Inc.*, 333 N.C. 233, 424 S.E.2d 391 (1993)).

Plaintiff contends that *Kolbinsky* is distinguishable because of the size difference in the machines and the resulting difference in the risk to each employee. This distinction is simply not relevant to the *Woodson* analysis: whether the employer knew its intentional misconduct was “substantially certain to cause serious injury or death to employees.” *Woodson*, 329 N.C. at 340, 407 S.E.2d at 228. Here, as in *Kolbinsky*, in the light most favorable to plaintiff, the evidence tended to show that defendants were aware a safety guard had been removed from dangerous machinery in violation of safety regulations and still instructed an unskilled, underage employee to operate it in violation of the law. Just as in *Kolbinsky*, these facts do not support the inference that Pallet Express and Briggs knew their actions were substantially certain to cause Nery’s serious injury or death. Plaintiff’s argument on this point is overruled.

As to plaintiff’s claims against Shropshire, our Courts have held that “the Workers, Compensation Act does not shield a co-employee from common law liability for willful, wanton and reckless negligence.” *Pleasant*, 312 N.C. at 716, 325 S.E.2d at 249. However, even when a co-worker “may have known certain dangerous parts of the machine were unguarded” when he instructed an employee to work at the machine, this does not support an inference that the co-worker knew his actions were substantially certain to cause serious injury or death nor does it show manifest indifference. *Pendergrass*, 333 N.C. at 238, 424 S.E.2d at 394.

After careful review of the record, we conclude that Shropshire’s alleged negligence falls short even of that alleged in *Pendergrass*. Plaintiff asserts that Shropshire’s conduct was willful, wanton and reckless in that he assigned an underage employee to work on the shredder from which a safety guard had been removed. However, unlike the co-worker in *Pendergrass*, it is undisputed that Shropshire

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was hired after the installation of the shredder and was unaware that it had once had a safety guard, or that such a guard had been removed. Thus, Shropshire was not aware of the increased danger to employees working on the machine. Because the alleged misconduct in *Pendergrass* could not support a *Pleasant v. Johnson* claim, plaintiff's lesser allegation here must also fail. This argument is overruled.

Because plaintiff failed to carry his burden as to any of his wrongful death claims, we affirm the trial court's grant of summary judgment in defendants' favor.

Affirmed.

Judges STEELMAN and BEASLEY concur.

STATE OF NORTH CAROLINA v. DENNIS WAYNE SHAW, DEFENDANT

No. COA09-1096

(Filed 5 October 2010)

Sentencing— aggravated range—trial court comments taken out of context

The trial court did not err in a second-degree murder case by sentencing defendant within the aggravated range based on the victim's great suffering prior to her death. Although defendant contended the trial court took into account a nonstatutory aggravating factor that was neither stipulated to nor found by a jury beyond a reasonable doubt, taken in context, the trial court's comments that the State had made a significant concession in not charging defendant with first-degree murder were in response to comments made by defense counsel during the proceeding regarding defendant's good character and reputation.

Appeal by defendant from judgment entered 3 February 2009 by Judge James E. Hardin, Jr., in Johnston County Superior Court. Heard in the Court of Appeals 11 March 2010.

Attorney General Roy Cooper, by Assistant Attorney General Daniel P. O'Brien, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Anne M. Gomez, for defendant.

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[207 N.C. App. 369 (2010)]

ELMORE, Judge.

On 19 April 2006, Ronda Barnes (the victim) was discovered dead at her home. Her body was covered and had been burned with sulfuric acid; the cause of death was blunt force trauma to the head that had resulted in extensive bruising and hemorrhaging of the brain. The victim had several external injuries to her head that included lacerations to her upper and lower lips, a fractured nose, and chemical burns to the face, head, upper chest, and legs.

At the sentencing hearing, defendant's counsel gave a statement that contained the following assertions: At the time of the incident, defendant lived and worked in Washington, D.C.; and he and the victim had a child together. On the day in question, defendant visited the victim at her house, but soon they began to argue and a physical altercation ensued. Defendant left the room at one point to check himself for a cut and, when he returned to the room, the victim threw a dark glass container at him that contained acid; at that point, he "lost it" and began kicking and striking the victim, including striking her in the face several times with his right knee. He stated that he found out only after his return to Washington, D.C., that the victim was dead.

Defendant entered an *Alford* plea to second degree murder. The superior court found mitigating factors and aggravating factors in regard to defendant's sentencing. The superior court noted that defendant had been a person of good character and had a good reputation in the community in which he lived; had accepted responsibility for his criminal conduct; had been supporting his family; had a positive support system in the community; and had a positive employment history. In regard to aggravating factors, defendant stipulated that the victim suffered greatly prior to her death. The superior court held that this aggravating factor outweighed the mitigating factors and so sentenced defendant to the maximum aggravated sentence of 196 to 245 months' imprisonment. Defendant appeals that sentence.

Defendant argues that the trial court took into account a non-statutory aggravating factor that was neither stipulated to nor found by a jury beyond a reasonable doubt, and which was not alleged in a charging document. Defendant's argument is based upon comments made by the trial court to the effect that (1) defendant could have been tried for premeditated first degree murder and (2) "the State . . . made a significant concession . . . allowing [him] to plead second-degree murder." Defendant argues that it can be inferred from these

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comments that the trial court considered improper and irrelevant matters when it rendered defendant's sentence. We disagree.

Upon motion by a defendant, a new sentencing hearing must be granted "when a judge aggravates a criminal sentence on the basis of findings made by the judge that are in addition to or in lieu of findings made by a jury." *State v. Hurt*, 361 N.C. 325, 329, 643 S.E.2d 915, 917 (2007). The standard in *Hurt* is based on *Apprendi*: "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 455 (2000). Said "statutory maximum" constitutes the maximum sentence a judge may impose "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely v. Washington*, 542 U.S. 296, 303, 159 L. Ed. 2d 403, 413 (2004) (emphasis removed; citations omitted).

On appeal,

a judgment is presumed to be valid and will not be disturbed absent a showing that the trial judge abused his discretion. When the validity of a judgment is challenged, the burden is on the defendant to show error amounting to a denial of some substantial right.

State v. Bright, 301 N.C. 243, 261, 271 S.E.2d 368, 379-80 (1980) (citation omitted).

Defendant's argument relies on *State v. Boone*, where our Supreme Court stated: "If the record discloses that the court considered irrelevant and improper matter[s] in determining the severity of the sentence . . . the sentence is in violation of defendant's rights." 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977) (citation omitted). However, *Boone* is distinguishable from the present case.

In *Boone*, the trial court threatened the defendant with a more severe sentence if the defendant exercised his right to a jury trial rather than pleading guilty to a lesser offense. *Id.* In the case at hand, no such threat—to punish defendant for exercising his constitutional rights—was made against defendant.

More on point here is *State v. Person*, 187 N.C. App. 512, 653 S.E.2d 560 (2007), rev'd in part on other grounds, 362 N.C. 340, 663 S.E.2d 311 (2008). In *Person*, the defendant argued that the trial court took into account improper matters when it rendered defendant's sentence. *Id.* at 525, 653 S.E.2d at 569. However, the defendant failed

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to address the context in which the comments were made and thus the trial court held that the standard in Boone did not apply:

defendant relie[d] on references of the trial judge to the fact that defendant rejected an offer by the State to grant concessions on charges or sentencing Defendant's argument, however, fails to take into account the context in which the trial judge made his remarks, including the fact that the trial judge was responding to statements made by defendant

Id. at 526, 653 S.E.2d at 569.

In the case at hand, defendant's argument similarly takes the trial court's comments out of context. When taken in context, the trial court's comments were clearly responses to comments made by defense counsel during the proceeding. Defense counsel made several references throughout the hearing regarding defendant's good character and reputation. During his colloquy with the court during the sentencing discussion, defense counsel even went as far as to say: "[W]hat you heard the good about [defendant] is better than what you're going to hear about most defendants that come to this courtroom." It was at that point that the trial court responded:

I don't know, but I suspect if this had actually been tried as first-degree murder, the State would have argued under a theory of first-degree murder on the basis of premeditation and deliberation, that those can develop for a very short time even during the assault. I think the instruction would be given to the jury of that being the law. So as it relates to the State giving the defendant no concession, I think that had it been tried before the jury, that that would have been an appropriate charge and been submitted to the jury under these facts with that instruction.

A few moments later, the trial court stated that the State had made a "significant concession" in not charging defendant with first degree murder.

Defendant argues that these statements by the trial court show that, when sentencing defendant shortly thereafter, the trial court took into account an aggravating factor that was neither proven nor stipulated to. We disagree.

As is clear from the context of the statement, the trial court's remark was in response to defense counsel's assertions regarding defendant's good character and reputation; the fact that sufficient

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evidence existed to charge defendant with premeditated and deliberate first degree murder is certainly inconsistent with defense counsel's assertions that defendant's good qualities placed him above all other previous defendants that had entered said courtroom.

Defendant is correct in his statement that, "[w]hen the trial judge errs in finding an aggravating factor and imposes a sentence in excess of the presumptive term, the case must be remanded for a new sentencing hearing." *State v. Wilson*, 338 N.C. 244, 259, 449 S.E.2d 391, 400 (1994) (citing *State v. Hayes*, 314 N.C. 460, 334 S.E.2d 741 (1985)). However, as we have held here that no such error was made by the trial judge, this principle is inapt here.

In sum, because the trial court did not err in sentencing defendant in the aggravated range, we find no error.

No error.

Judges JACKSON and STROUD concur.

SUZANNE HASSELMANN, PLAINTIFF V. BRUCE BARNES, INDIVIDUALLY AND AS TRUSTEE, AND MICHAEL P. BARNES, INDIVIDUALLY AND AS TRUSTEE, DEFENDANTS

No. COA09-1583

(Filed 5 October 2010)

Parties— necessary parties—trust beneficiaries

A partial summary judgment in a trust action was remanded where beneficiaries whose interests would be affected were not included as parties.

Appeal by defendant Bruce Barnes from order entered 5 February 2009 by Judge Jay D. Hockenbury in Superior Court, New Hanover County. Heard in the Court of Appeals 28 April 2010.

Ennis Coleman, LLP, by David Paul Ennis, for plaintiff-appellee.

Stricklin Law Firm, P.A., by Bobby J. Stricklin, for defendant-appellant.

STROUD, Judge.

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On 24 October 2007, plaintiff filed a verified complaint against defendants Bruce Barnes and Michael Barnes. Plaintiff alleged she is one “of seven (7) named beneficiaries” of a trust for which defendants are trustees. Plaintiff brought causes of action for breach of fiduciary duty, constructive fraud, and gross negligence. Plaintiff included the “TRUST INDENTURE” as an exhibit to her complaint and it identifies seven individuals as beneficiaries of the trust. Defendants are beneficiaries as well as trustees, so there are four other beneficiaries of the trust who are not parties to this case. On 30 July 2008, defendant Bruce Barnes filed a *pro se* answer to plaintiff’s complaint and counterclaimed for reformation of the trust instrument. Defendant Michael Barnes did not file an answer or otherwise respond to the complaint. On 15 May 2008, plaintiff responded to defendant Bruce Barnes’s counterclaim. On or about 22 December 2008, plaintiff filed a motion for summary judgment against defendant Bruce Barnes only. On 5 February 2009, the trial court granted plaintiff’s motion for summary judgment as to her claim for breach of fiduciary duty against defendant Bruce Barnes; the trial court denied plaintiff’s motion for summary judgment as to her claims for gross negligence and constructive fraud. Defendant Bruce Barnes (hereinafter “defendant”) appeals.

We first note that the order granting partial summary judgment fails to dispose of all claims or all parties to this lawsuit, as it granted summary judgment as to only one of the two defendants on only one of three claims. However, we need not address the interlocutory nature of defendant’s appeal or the substantive issues argued, as we must *ex mero motu* remand for joinder of the beneficiaries who are not parties to this action as necessary parties. *See Dunn v. Cook*, — N.C. App. —, —, 693 S.E.2d 752, 754 (2010) (“Although neither party has raised the issue of whether all of the remainder beneficiaries of the trust are necessary parties to this action under N.C. Gen. Stat. § 1A-1, Rule 19, this question must be addressed first. It is appropriate, and indeed necessary, for us to raise this issue *ex mero motu*.”)

When dealing with a trust, the general rule in suits, respecting the trust property, brought either by or against the trustees, the . . . beneficiaries as well as the trustees also, are necessary parties. And when the suit is by or against the . . . beneficiaries, the trustees are also necessary parties; and trustees have the legal interest, and, therefore, they are necessary parties; . . . beneficiaries, have the equitable and ultimate interest, to be affected by the decree, and, therefore, they are necessary parties[.]

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Dunn at —, 693 S.E.2d at 756 (citation, quotation marks, ellipses, and brackets omitted).

Although defendant's counterclaim alleges that "[n]o beneficiary other than plaintiff counterclaim-defendant Suzanne Hasselmann opposes the relief sought in this counterclaim[.]" the record before us does not include any appearance by the other four beneficiaries or any indication that the other four beneficiaries of the trust have notice of this lawsuit. Defendant's *pro se* answer and counterclaim was filed only on his own behalf; defendant does not purport to represent the other beneficiaries in any way. In addition, because the beneficiaries all share equal percentage interests in the trust, based upon the claims raised by plaintiff, all of the beneficiaries' interests in the trust would necessarily be equally affected by the outcome of this action.

We also note that defendant argues that this action is controlled by New Jersey law. Defendant's counterclaim alleges that "[p]er the opinion of the Hon. Robert Contillo, Judge of the Superior Court, Chancery Division, Bergen County, New Jersey (annexed as Exhibit A hereto) this matter is governed by New Jersey law." However, "Exhibit A" to the counterclaim is not included in our record, so we do not know what sort of other legal action, if any, may have occurred in regard to this trust in New Jersey. But even in the absence of any New Jersey order regarding the trust, the trust includes a provision that

[t]his Trust Indenture and all trusts created hereunder shall be construed, and their validity and effect and the rights hereunder of the respective beneficiaries of each such trust and the Trustees and any successor Trustees shall be at all times determined, in accordance with the laws of the State of New Jersey insofar as they can be applied.

However, without determining whether New Jersey law should control this issue, we note that New Jersey law as to joinder of necessary parties in this situation is the same as North Carolina law.¹ *See Spitz v. Dimond*, 24 A.2d 188, 189 (N.J. 1942) ("Whenever the handling of trust funds is called in question, all trustees and all cestuis que trust should be parties to the suit so as to minimize future litigation and

1. In some cases, where beneficiaries are unable to be presently determined or located, joinder of all is not required, *see Baird v. Peoples Bank & Trust Co. of Westfield*, 33 A.2d 745, 747 (N.J.Ch. 1943), but here no such difficulty arises, as the four beneficiaries who were not included as parties to this action are all named individuals, identified in the trust indenture as the grantor's children.

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assure that all parties interested in the subject-matter will be bound by the decree.” (citations omitted)).

Because four beneficiaries whose interests will be affected by this action were not included as parties, the trial court should have required joinder of all necessary parties. *See Dunn* at —, 693 S.E.2d at 756. Therefore, we express no opinion on the merits of this case but instead reverse the partial summary judgment order and remand for further proceedings not inconsistent with this opinion. *See Dunn* at —, 693 S.E.2d at 756; *Wall v. Sneed*, 13 N.C. App. 719, 725, 187 S.E.2d 454, 458 (1972).

REVERSED AND REMANDED.

Judges McGEE and HUNTER, JR., Robert N. Concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 5 OCTOBER 2010)

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|---|---|---|
| FAULKERSON v. ALLEN No. 09-1331 | Union (09CVS482) | Affirmed; Remanded for hearing concerning reasonable expenses |
| GAYATRI MAA, INC. v. TERRIBLE T. LLC No. 09-1614 | Onslow (09CVD1165) | Affirmed |
| IN RE A.B.P., V.A.P., M.N.M., E.B.M., A.B.K. No. 10-466 | Gaston (08JT21) (08JT16-19) | Affirmed |
| IN RE C.R.E.A. No. 10-467 | Yancey (03J59) | Affirmed |
| IN RE J.D. No. 10-422 | Wake (07JA705) | Affirmed in part; reversed and remanded in part |
| IN RE J.J. & J.J. No. 10-458 | Gaston (02J122-123) | Affirmed |
| IN RE S.N.W. & A.Z.W. No. 10-468 | Haywood (07JT10-11) | Affirmed |
| KITTRIDGE v. HEGNEY No. 09-1357 | Mitchell (05CVD155) | Affirmed in part, reversed and remanded in part |
| MILLER v. ELLWOOD No. 10-256 | Wake (09CVD2027) | Dismissed |
| STATE v. ABSHER No. 09-1426 | Wilkes (07CRS53968-69) | Affirmed |
| STATE v. ARNOLD No. 10-156 | Wake (08CRS39416) (08CRS65975) | No Error |
| STATE v. BROWN No. 09-1601 | Brunswick (08CRS55619) (08CRS55535) | No Error |
| STATE v. CARPENTER No. 09-1247 | Lincoln (06CRS52190) | No Error |

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| STATE v. DUARTE-GOMEZ No. 10-141 | Guilford (09CRS71091-92) | No Error |
| STATE v. GOULD No. 10-194 | Onslow (08CRS59756) | No Error |
| STATE v. JOHNSON No. 10-143 | Pitt (07CRS54670-71) (07CRS54669) | No error in part; remanded in part; dismissed in part |
| STATE v. LOCKHART No. 09-1660 | Mecklenburg (08CRS217825) (08CRS217828) | No Error |
| STATE v. MCCLELLAND No. 10-33 | Iredell (08CRS50388) | Dismissed |
| STATE v. MCCOY No. 10-10 | Gaston (09CRS51711) (09CRS51714) (09CRS51708) | 09CRS051708, First-degree Burglary-Vacated and Remanded for Entry of Judgment and Sentencing for Felonious Breaking or Entering. 09CRS051711, Attempted Robbery with a Dangerous Weapon- Vacated. 09CRS051714, Larceny of a Firearm- No Error. |
| STATE v. REID No. 10-83 | Cabarrus (06CRS6940) (06CRS6937) | Affirmed |
| STATE v. SURREATT No. 10-184 | Orange (08CRS6311) (08CRS50842) | No Error |
| WHITE v. STOKES CNTY. DSS No. 09-1567 | Stokes (07CVS1002) | Affirmed |

STATE v. ROSS

[207 N.C. App. 379 (2010)]

STATE OF NORTH CAROLINA v. JOVAR LAMAR ROSS, DEFENDANT

No. COA09-1021

(Filed 19 October 2010)

1. Jury— deliberations—deadlocked—trial court comments did not coerce verdict

The trial court did not commit plain error in a delivery of a counterfeit controlled substance case by its instructions and remarks to a deadlocked jury. The trial court's comments did not have the effect of coercing the jury to reach a verdict, and the totality of circumstances revealed that a second *Allen* instruction was not required. Some of the trial court's comments were not subject to plain error review as they were not jury instructions, but instead were discretionary rulings by the trial court. Further, the trial court should have refrained from entering the jury room during deliberations to discuss the jury's progress, to avoid the possibility of improperly influencing the jury.

2. Appeal and Error— preservation of issues—failure to timely object at trial

Although defendant contended in a delivery of a counterfeit controlled substance case that the trial court violated its statutory duties under N.C.G.S. § 15A-1234(c) to inform the parties generally of the instructions it intended to give the deadlocked jury and afford them an opportunity to be heard, defendant waived this argument under N.C. R. App. P. 10(b)(1) by failing to timely object at trial. Defendant's argument did not fit within the exception under N.C.G.S. § 15A-1446(d)(12). Further, defendant failed to argue plain error.

3. Jury— deliberations—bailiff delivered requested exhibit to jury room—failure to bring jury back to courtroom

Although the trial court technically violated N.C.G.S. § 15A-1233(a) in a delivery of a counterfeit controlled substance case by instructing the bailiff to deliver a requested exhibit to the jury room during deliberations with the instruction "we need that back" without bringing the jury back to the courtroom for the instruction, it was not prejudicial error. "We need that back" was not a communication regarding material matters of the case. Further, the bailiff was a sworn officer of the court whose normal duties included conveying certain communications between the court and the jury.

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4. Appeal and Error— preservation of issues—failure to object at trial

Although defendant contended the trial court erred in a delivery of a counterfeit controlled substance case by permitting the State to read a portion of defendant's indictment to the jury in violation of N.C.G.S. § 15A-1221(b), defendant waived this argument under N.C. R. App. P. 10(b)(1) by failing to object at trial.

5. Evidence— hearsay—officer testimony—drug neighborhood—no plain error

The trial court did not commit plain error in a delivery of a counterfeit controlled substance case by allowing an officer to characterize the neighborhood where the drug transaction allegedly occurred as a "high drug location" and an "open air market for drugs." It was unlikely that the jury's verdict would have been different absent this evidence in light of the substantial evidence of defendant's guilt.

6. Sentencing— habitual felony—failure to redact statements from transcript of plea not prejudicial error

Although the trial court erred in the habitual felon phase of a trial by refusing to redact challenged statements on the transcript of plea for defendant's predicate felony, defendant failed to demonstrate how the evidence prejudiced him given the overwhelming and uncontradicted evidence of the three prior felony convictions.

Appeal by defendant from judgment entered on or about 18 December 2008 by Judge Anderson Cromer in Superior Court, Forsyth County. Heard in the Court of Appeals 13 January 2010.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Richard A. Graham, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate

Defender Andrew DeSimone, for defendant-appellant.

STROUD, Judge.

Jovar Lamar Ross ("defendant") appeals from his conviction for delivery of a counterfeit controlled substance and attaining the status of habitual felon. For the following reasons, we find no error.

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[207 N.C. App. 379 (2010)]

I. Background

The State's evidence tended to show that on 25 July 2007, Detective Rene Melley of the Winston-Salem Police Department was working undercover with other detectives in an attempt to purchase illegal narcotics in the area of Chandler Street near Old Greensboro Road in Winston-Salem. Around 6 p.m. in an unmarked police vehicle, Detective Melley drove past a man walking in the opposite direction down Chandler Street. After Detective Melley passed him, she looked in her rear-view mirror and noticed that the man was motioning for her to come back. Detective Melley stopped her vehicle, notified her surveillance, and then backed down the street to where the man was standing. Detective Melley testified that he "was wearing a brown t-shirt, long, dark blue jean shorts and a black, what we call, [a] skull cap." Detective Melley stopped her vehicle and rolled down the passenger side window. The man approached her vehicle, leaned inside the passenger side window, and asked, "What's up?" Detective Melley told him that she needed "a 20." She explained that "a 20 is a common street term used to describe 20 dollars worth of crack cocaine." The man then cupped his hand and gave detective Melley "an off-white rock-like substance that was similar in appearance to crack cocaine." Because of the flat shape of the substance, Detective Melley was skeptical as to whether it was actually crack cocaine. Later analysis by the State revealed that the substance was not crack cocaine. As Detective Melley handed the \$20 to the man, her close cover, Detective Chris Diamont, drove past them and the man "pulled away from [her] window and began walking in the same direction that he was originally walking when [she] pulled through the area." Fifteen minutes after her interactions with defendant, Detective Melley was given defendant's name by another police officer at the staging area. She looked up defendant's name on the police department's computer database, which included a picture of defendant, and confirmed that defendant was the man from whom she had "just purchased the counterfeit substance" from on Chandler Street. At trial, Detective Melley identified the man from whom she had bought the substance on Chandler Street as defendant.

Detective Diamont testified that on 25 July 2007 he was working undercover as Detective Melley's close cover, which involved identifying anyone she would come in contact with. Detective Diamont confirmed at trial that he had seen defendant approach Detective Melley's vehicle and lean into the passenger side window, as he drove by the scene.

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Following Detective Melley's and Detective Diamont's interactions and observations of defendant, Corporal Michael Knight with the Winston-Salem Police Department was called to respond to the area in a marked patrol vehicle. Based on a description given to him by other officers, Corporal Knight was able to identify and stop defendant. Defendant spoke with Corporal Knight and identified himself as Jovar Ross. Corporal Knight verified defendant's identification on the police department's computer database, which included a picture of defendant. Corporal Knight asked for consent to search defendant. Defendant consented to a search but Corporal Knight did not find anything on defendant. Corporal Knight then "radioed back the name and information that [he] received to the Vice and Narcotics Division." At trial, Corporal Knight identified the person that he stopped that day as defendant. Defendant was not arrested on 25 July 2007, when the transaction occurred, but in November of 2007 "at the culmination of [a] four month, ongoing investigation."

On 12 May 2008, defendant was indicted on one count of delivery of a counterfeit controlled substance and having attained the status of habitual felon. Defendant was tried during the 15 December 2008 Criminal Session of Superior Court, Forsyth County. Defendant did not testify at trial. On 17 December 2008, a jury found defendant guilty of delivering a counterfeit controlled substance and attaining the status of habitual felon. On 18 December 2008, the trial court sentenced defendant to a term of 107 to 138 months imprisonment. On 18 December 2008, defendant filed written notice of appeal.

II. The Trial Court's Comments to the Jury

[1] Defendant first contends that the trial court's instructions and remarks to the jury had the effect of coercing "the deadlocked jury to reach a guilty verdict in violation of Article I, Section 24 of the North Carolina Constitution[.]" First, we note that defendant did not properly preserve this constitutional challenge to the trial court's jury instructions by raising this issue at trial, *see State v. Gainey*, 355 N.C. 73, 87, 558 S.E.2d 463, 473 ("Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal."), *cert. denied*, 537 U.S. 896, 154 L. Ed. 2d 165 (2002). However, in the alternative, defendant argues that despite his failure to make a timely argument or objection to the trial court's instructions, a plain error analysis should apply to his argument that the trial court's comments were coercive.

The trial transcript shows that the trial court gave defense counsel the opportunity to make objections regarding his comments to the jury,

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after sending the jury back for further deliberations, but no objections were made. Therefore, defendant did not properly preserve this issue for appellate review by presenting to the trial court “a timely request, objection or motion stating the specific grounds for the ruling” and “obtain[ing] a ruling upon the party’s request, objection or motion.” N.C.R. App. P. 10(b)(1). However, North Carolina Rule of Appellate Procedure 10(c)(4) provides that

[i]n criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action, nevertheless may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C.R. App. P. 10(c)(4). Our Supreme Court has noted that

the plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury’s finding that the defendant was guilty.

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (internal quotation marks omitted) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513, (1982)). Our Courts have consistently held that “plain error analysis applies only to jury instructions and evidentiary matters[.]” *State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39-40 (2002), *cert. denied*, 537 U.S. 1117, 154 L. Ed. 2d 795 (2003); *See State v. Garcell*, 363 N.C. 10, 35, 678 S.E.2d 618, 634 (2009) (“Plain error analysis applies to evidentiary matters and jury instructions.”) “[T]he defendant has the burden of showing that the error constituted plain error[.]” *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997).

Here, defendant attempts to make his plain error argument fit under the “jury instruction” category of error. The trial court made a series of statements in response to the jury’s indications that they were dead-

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locked on three separate instances. On 17 December 2008, the jury was charged and retired to deliberate at 10:28 a.m. The trial court received notice around 12:11 p.m. from the jury stating, "We are hung." The trial court brought the jury back into the courtroom and made the following statement to them:

I got your note, the last one. Did I ever tell any of you that this job was easy? I'm going to ask that you go back and continue to work together to see if you can render a verdict in this case. At 12:30, we're going to stop, we'll bring you back in, and we're all going to go to lunch. And then if you haven't reached a verdict by then, we will come back.

Now, it's up to me based on what I hear from you to determine whether or not the time has come where you cannot reach a verdict and I'm not yet at that point. All right? So I don't want you to go back there and spend all of your time trying to figure out how you can convince me you're at that point, but see if you can convince yourselves that you're unable to reach a verdict.

The trial court then told the jury in open court an anecdote relating to his interactions with a jury in a previous case:

Now, I had a jury one time that deliberated for six days. Now, I didn't make them stay and work for six days just because I wasn't convinced that they couldn't reach a verdict, but every day they told me that even though they hadn't been able to reach a verdict, their foreperson said, 'Judge, I think we're making progress.'

I asked the foreperson one day, I said, 'Well, did you take a vote yesterday?'

And he said, 'Yes, we did.'

And I said, 'Well, I don't want to know how you voted but tell me what the number was,' and he said it was 6 to 6.

And I said, 'Well, did you take a vote today?'

And he said, 'Yes.'

And I said, 'What was the vote?'

'Well, it was 6 to 6.'

And I said to him, 'Well, then how are you making progress?'

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And he said, 'It's not the same six.'

Now, let me just leave it at that . . . I have heard from you. I understand what your foreperson wrote down, that we all together acknowledge that this job is not as easy as some of you may have thought it might be, and I'm not suggesting that you did, but most of you haven't been jurors before. I'm acknowledging that you all paid attention to the proceedings, that you've all acknowledged that you've followed the law, and I think we all have to acknowledge that you understand what your duty is

The trial court again told the jury to go back for further deliberations; they would have lunch at 12:30; he would send a copy of the jury charge to them; and then sent the jury back to the jury room.

Around 2:44 p.m., the trial court received a second message from the jury, stating, "THIS JURY IS HUNG. [The vote] WAS 8-4 [but] NOW [is] 11-1. **FINAL.**" (Emphasis in original.) In response, the trial court brought the jury back into the courtroom, and made the following comments:

I want to emphasize the fact that it's your duty to do whatever you can to reach a verdict. You should reason the matter over together. I'm not suggesting that you haven't, but I'm suggesting to you that you try again as reasonable men and women and to reconcile your differences, if you can, without the surrender of conscientious convictions. But no juror should surrender his or her honest conviction as to the weight or effect of the evidence solely because of the opinion of his or her fellow jurors, or for the mere purpose of returning a verdict. I will let you resume your deliberations and see if you can once more reach a verdict. I'll hear back from you if you cannot, but I'm not declaring this hopelessly deadlocked.

The trial court then sent the jury back for further deliberations.

Around 3:29 p.m., the trial court received a third message from the jury which stated: "HUNG JURY. 11-1. (Deadlock)." (Emphasis in original.) In response, the trial court brought the jury back into the courtroom and stated:

We're going to take a ten minute recess, all of us, ten minutes, which will be 3:45. I'm going to ask that—no, I'm going to tell you all to be back in that jury room and continue your deliberations. But for the next ten minutes you're not to talk about this case with anyone. So at 3:45, you will continue your deliberations and

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you'll either give me your verdict or I will be in touch with you shortly thereafter.

I understand your position thus far. I got your note. I understand it. It's short, to the point. It's direct, but I don't accept it yet. I only ask that you respect my decision as I respect yours. So be back at 3:45 to give yourselves just a complete break. If you need to take a walk, just don't walk too far. Be back in the jury room. And if you have to talk to anybody about directions or anything, make sure it's one of these folks that are charged with tending to your needs, but don't talk to anybody else about the case.

See you back at 3:45 p.m.

The trial court then gave the jury a short recess and then sent them back to the jury room for further deliberations at 3:48 p.m. At about 4:21 p.m., the trial court went back on the record and stated that

[w]ith the permission of the parties, I knocked on the [jury room] door at 4:20. They invited me in and I asked the foreperson, 'Are you making any progress?' And the foreperson . . . said, 'Little to none.' And I said, 'Little to none?' to which the other 11 jurors said, 'None.' So I'm at the point where I'm going to ask them to come in and declare this a mistrial. Any objections from either party?

Defense counsel made no objection. The State requested that the trial court wait until 4:30 p.m. to bring the jury back in; defense counsel consented to the State's request, and the trial court agreed to wait. While the trial court and the State were discussing other matters, the trial court received notice that the jury had reached a verdict. The jury then returned to the courtroom and delivered a verdict finding defendant guilty of delivering a counterfeit controlled substance. The trial court then proceeded to trial on the habitual felon charge, instructed the jury, and sent them to deliberate on this issue at 6:15 p.m. The trial court gave the jury the option of returning on the following day to deliberate or completing deliberations that night, as it was after 6:00 p.m. The jury sent a note informing the court that it would like to deliberate that night and asking for copies of State's exhibits 1, 2, and 3. At 6:42 p.m., the jury returned a guilty verdict on the habitual felon charge.

Defendant specifically contends that the trial court's "actions seriously undermined the fairness of the trial and had a probable impact on the jury's finding of guilt and thus amounted to plain error for which [defendant] must receive a new trial." However, as stated above, our plain error analysis is limited to reviewing "jury instructions and

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evidentiary matters[.]” *Wiley*, 355 N.C. at 615, 565 S.E.2d at 39-40. Therefore, we must determine whether the trial court’s comments following the jury’s three notes to the trial court that they were at a deadlock were “instructions” in order to conduct a plain error analysis of defendant’s argument.

Defendant first contends that the trial court gave coercive instructions to the jury following its first notice around 12:11 p.m. stating that, “We are hung.” We note that the jury made no requests for instruction as to the applicable law or for additional evidence with this first notice, but only informed the trial court that they were having difficulty in reaching a decision. Accordingly, the only information communicated by the trial court to the jury following this first notice of deadlock was (1) that the decision of whether to send the jury back for deliberations was in the trial court’s discretion; (2) the trial court had made the decision to send them back for further deliberations; and (3) they were going to recess for lunch at 12:30 p.m. The trial court followed this information with comments to encourage the jury to continue in its deliberations, followed by an illustrative anecdote, but did not give any further instructions.

The trial court’s comments to the jury following its second notice of deadlock around 2:44 p.m. were in substance the instructions enumerated in N.C. Gen. Stat. § 15A-1235(b) commonly referred to as an *Allen* instruction. *See Allen v. United States*, 164 U.S. 492, 41 L. Ed 528 (1986). Our Supreme Court has held that the instructions in N.C. Gen. Stat. § 15A-1235(b) need not be read verbatim if “the trial court gives the substance of the four instructions” *State v. Fernandez*, 346 N.C. 1, 23, 484 S.E.2d 350, 364 (1997). However, defendant does not argue that this *Allen* instruction was given in error.

Defendant does argue that the trial court gave coercive instructions to the jury following its third notice that it was at a deadlock at 3:29 p.m. Again the trial court announced a recess, told the jurors not to discuss the case during the recess, and ruled that he would be sending the jury back for further deliberations. No further “jury instructions” were given. This Court has previously held that “[t]he purpose of an instruction is to clarify the issues for the jury and to apply the law to the facts of the case.” *State v. Harris*, 47 N.C. App. 121, 123, 266 S.E.2d 735, 737 (1980). We note that in the trial court’s comments following the jury’s first and third indications that they were at a deadlock, the judge was not clarifying an issue for the jury or giving instruction as to how the law applied to the facts of the case. The trial court was merely announcing that it was within his discretion pursuant to N.C. Gen. Stat.

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§ 15A-1235(c) to order the jury to continue deliberations and then making a ruling exercising that discretion on these two separate occasions. See N.C. Gen. Stat. § 15A-1235(c) (“If it appears to the judge that the jury has been unable to agree, the judge *may* require the jury to continue its deliberations” (emphasis added)); *State v. Goode*, 300 N.C. 726, 729, 268 S.E.2d 82, 84 (1980) (“Matters relating to the actual conduct of a criminal trial are left largely to the sound discretion of the trial judge so long as defendant’s rights are scrupulously afforded him.”). As the plain error analysis “is always to be applied cautiously and only in the exceptional case[.]” *Odom*, 307 N.C. at 660, 300 S.E.2d at 378, we decline to apply a plain error review to the trial court’s comments in this situation, as they were not “jury instructions” but instead were discretionary rulings by the trial court.

Defendant also argues that it was plain error for the trial court to not give a second *Allen* instruction following the jury’s third indication that they were at a deadlock. As defendant made no objection at trial and this is in regard to the trial court’s instructions, *Wiley*, 355 N.C. at 615, 565 S.E.2d at 39-40, we review for plain error. Commonly referred to as an *Allen* instruction, see *Allen v. United States*, 164 U.S. 492, 41 L. Ed. 528 (1896), N.C. Gen. Stat. § 15A-1235(b) states that

the judge may give an instruction which informs the jury that:

- (1) Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
- (2) Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;
- (3) In the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and
- (4) No juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

Our Supreme Court has held that “it is clearly within the sound discretion of the trial judge as to whether to give an instruction pursuant to N.C.G.S. § 15A-1235(c).” *State v. Cheek*, 351 N.C. 48, 88, 520 S.E.2d 545, 568 (1999) (citation and quotation marks omitted). We have held that “[t]he purpose behind the enactment of N.C.G.S. § 15A-1235 was to avoid coerced verdicts from jurors having a difficult time reaching a

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unanimous decision.” *State v. Dexter*, 151 N.C. App. 430, 435, 566 S.E.2d 493, 497 (citation and quotation marks omitted), *aff’d per curiam*, 356 N.C. 604, 572 S.E.2d 782 (2002). “A trial court abuses its discretion if its determination is manifestly unsupported by reason and is so arbitrary that it could not have been the result of a reasoned decision.” *State v. Cummings*, 361 N.C. 438, 447, 648 S.E.2d 788, 794 (2007) (citation and quotation marks omitted). “We determine whether a trial court abused its discretion by looking at the totality of the circumstances.” *State v. Herrera*, 195 N.C. App. 181, 199, 672 S.E.2d 71, 83 (2009) (citing *Dexter*, 151 N.C. App. at 433, 566 S.E.2d at 496).

Looking at the totality of the circumstances, we note that the jury exited the courtroom following the trial court’s first *Allen* instruction at 2:46 p.m. and sent to the trial court its third indication that it was at a deadlock at 3:29 p.m. It is difficult to see how another *Allen* instruction approximately 45 minutes after the first would have been necessary or helpful to the jury or that it would have had any impact on the outcome of the case. Also, the trial court made no additional comments to the jury that an *Allen* instruction would be helpful in clarifying. The trial court’s only comments to the jury were to inform them of a recess, for them not to discuss the case during the recess, and for them to continue their deliberations after that recess. Therefore, we cannot say that the trial court abused its discretion by not giving a second *Allen* instruction, and if this was not error, it cannot be plain error. *Odom*, 307 N.C. at 660, 300 S.E.2d at 378. Accordingly, we overrule defendant’s argument.

Defendant also argues that the trial court’s *ex parte* contact with the jury also amounted to plain error. Defendant again made no objection to the trial court’s contact with the jury at trial. However, as plain error is only applicable to issues regarding jury instructions and evidentiary matters, *Wiley*, 355 N.C. at 615, 565 S.E.2d at 39-40, we decline to extend plain error review to this argument, and defendant has not properly preserved this issue for our review. However, in addressing the general concern over *ex parte* contact with the jury, we have difficulty imagining circumstances in which it would be appropriate for the trial judge to enter a jury room during deliberations and to speak to the jurors regarding the case instead of bringing the jury back into the courtroom. *See State v. Payne*, 320 N.C. 138, 139-40, 357 S.E.2d 612, 612-13 (1987) (The Court granted the defendant a new trial when at the conclusion of jury selection in his capital trial, the trial court told the court reporter, “You may show that I am giving the jury a break and that I am going to administer my admonitions to them in the jury room[,]” as this *ex parte* contact by the trial judge was held to be a violation of the

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defendant's constitutional right "to be present in person at every stage of his trial . . . because the defendant's presence at that time could have had a reasonably substantial relation to his ability to present a full defense." (citations omitted). *But see State v. Cunningham*, 344 N.C. 341, 354, 474 S.E.2d 772, 777 (1996) (The Court held no error when during jury selection, the trial judge sent the jurors being examined from the courtroom; because "[t]here was a shortage of deputies in the courtroom," the trial judge led the prospective jurors to their room but "did not speak to any of the prospective jurors while she was leading them to their room.") Under the circumstances presented here, there does not appear to have been any reason for the trial judge to visit the jury room during deliberations, rather than addressing the jurors in open court in the usual manner. We can find no North Carolina case addressing a trial judge's entry into a jury room during deliberations for the purpose of inquiring as to the jury's progress, but we agree with the opinion of the Minnesota Supreme Court in *State v. Mims*, 306 Minn. 159, 235 N.W.2d 381 (1975) as to the influence exerted by a trial judge's uninvited entrance into the jury room during deliberations:

The trial judge, as the neutral factor in the interplay of our adversary system, is vested with the responsibility to ensure the integrity of all stages of the proceedings. This pervasive responsibility includes avoidance of both the reality and the appearance of any impropriety by so directing and guiding the proceedings as to afford the jury fair and independent opportunity to reach an impartial result on the issue of guilt. Thus, the trial judge's position in performing his role and function before submission of the case is a powerful one and makes him an imposing figure in the minds of the jurors. Called upon to perform unaccustomed duties in strange surroundings, the average juror is very sensitive to any hint or suggestion by the judge-however proper the judge's conduct. When during the judge's instructions it is impressed upon the jurors that they alone are the exclusive judges of the facts and the credibility of the witnesses, and that no act, word, sign, gesture, or inflection of voice by him is to influence their deliberations, the reality of the jury's independent function emerges. The withdrawal of the jury into a separate room, the administration of the oath to their custodians the bailiffs, the traditionally locked door, and other safeguards which prevent any intrusion during deliberations, all serve to emphasize meaningfully the independence of the jury's final, collective, decisional process and to create an atmosphere in which any incorrect notions jurors may have that they are to be influenced by the judge might be removed.

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In view of the judge's dominant role during earlier stages of the trial, an uninvited entrance into the sanctity of the jury room for any purpose offends the integrity of the proceedings and risks influencing the jury's decisional process in some degree, however difficult to define or impossible to measure. At the very least, such unwarranted entrance disrupts the jury's deliberations, intrudes upon their independence, and transgresses the carefully drawn lines of demarcation between the functions of the trial judge and the functions of the jury. When such an intrusion occurs, we believe there is a significant interference with the orderly decisional process, and prejudice to the process results by the implication that the judge has the prerogative of entering the jury room and there exercising the same dominant authority he possesses in the courtroom.

Id. at 168-69, 235 N.W.2d at 387-88. Accordingly, we admonish the trial court that it should refrain from entering the jury room during deliberations to discuss the jury's progress to avoid the possibility of improperly influencing the jury and to avoid disruptions in the juror's deliberation process.

III. Violations of N.C. Gen. Stat. § 15A-1234(c)

[2] Defendant next contends that the reason for his lack of objection or a request declaration of mistrial based upon the trial court's comments following the jury's three indications that they were at a deadlock was that "the trial court violated its statutory duties under N.C. Gen. Stat. § 15A-1234(c) to 'inform the parties generally of the instructions [it] intends to give' and afford them an opportunity to be heard." N.C. Gen. Stat. § 15A-1234(c) (2007) states that

[b]efore the judge gives additional instructions, he must inform the parties generally of the instructions he intends to give and afford them an opportunity to be heard. The parties upon request must be permitted additional argument to the jury if the additional instructions change, by restriction or enlargement, the permissible verdicts of the jury. Otherwise, the allowance of additional argument is within the discretion of the judge.

N.C. Gen. Stat. § 15A-1446(a) (2007) states that in criminal cases an "error may not be asserted upon appellate review unless the error has been brought to the attention of the trial court by appropriate and timely objection or motion[,]" and subsection (b) states that "[f]ailure to make an appropriate and timely motion or objection constitutes a

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waiver of the right to assert the alleged error upon appeal[.]”¹ N.C. Gen. Stat. § 15A-1446(d) enumerates specific grounds which “may be the subject of appellate review even though no objection, exception or motion has been made in the trial division[.]” one of which includes “(12) Rulings and orders of the court, not directed to the admissibility of evidence during trial, when there has been no opportunity to make an objection or motion.” However, contrary to defendant’s argument, the trial transcript indicates that following the trial court’s above comments to the jury regarding its deliberations, the trial court gave defense counsel the opportunity to make objections each time out of the presence of the jury and no objections were made by defense counsel. Therefore, defendant’s argument does not fit within the exception enumerated in N.C. Gen. Stat. § 15A-1446(d)(12). By failing to make a timely objection at trial based on N.C. Gen. Stat. § 15A-1234(c), defendant has waived this argument on appeal. *See* N.C. Gen. Stat. § 15A-1446(b); N.C.R. App. P. 10(b)(1).

Defendant also argues for review pursuant to N.C. Gen. Stat. § 15A-1443(a). However, review pursuant to N.C. Gen. Stat. § 15A-1443(a) is limited to those errors preserved by a “timely objection.” *State v. Parker*, 354 N.C. 268, 290, 553 S.E.2d 885, 901 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002). Here, as stated above, defendant did not make a timely objection to any of the trial court’s comments or instructions to the jury and has not preserved review pursuant to N.C. Gen. Stat. § 15A-1443(a). Defendant also makes no argument as to plain error and therefore waives his right to plain error review on this issue. *See State v. Harrington*, 171 N.C. App. 17, 32, 614 S.E.2d 337, 349 (2005) (“[Defendant] does not argue plain error, and therefore waives his right to plain error review.”) Accordingly, defendant has not properly preserved this issue for appellate review.

IV. Violation of N.C. Gen. Stat. § 15A-1233(a)

[3] Defendant argues next that following the jury’s request for State’s exhibit 3 during deliberation, the trial court, in sending the exhibit back to the jury, in error instructed the bailiff to deliver the exhibit to the jury room “with the instruction that we need that back[.]” without bringing the jury back to the courtroom for that instruction in violation of N.C. Gen. Stat. § 15A-1233(a). Defendant, relying on *State v. Ashe*, 314 N.C. 28, 331 S.E.2d 652 (1985), argues that by not bringing the jury back to the courtroom as required by N.C. Gen. Stat. § 15A-1233(a), the trial court “risked miscommunication of its instruction” if the bailiff “inac-

1. *See also* N.C.R. App. P. 10(b)(1).

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curately relayed the instruction to [defendant's] detriment." (Quotation marks omitted.)

First, we note that defendant failed to make an objection in regard to this statutory violation at trial, and ordinarily this failure would result in waiver of defendant's argument on appeal. *See* N.C. Gen. Stat. § 15A-1446(b); N.C.R. App. P. 10(b)(1); *Parker*, 354 N.C. at 290, 553 S.E.2d at 901. However, our Supreme Court has held that when a trial court commits a statutory violation of N.C. Gen. Stat. § 15A-1233(a) "and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial." *Ashe*, 314 N.C. at 39, 331 S.E.2d at 659. N.C. Gen. Stat. § 15A-1233(a) (2007) states that

[i]f the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. In his discretion the judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

As noted by defendant, the Court in *Ashe* addressed the situation where the trial court had the jury foreman relay instructions back to the jury in the jury room. In *Ashe*, the jury foreman returned to the courtroom while the jury was deliberating, whereupon the following exchange took place:

THE COURT: Mr. Foreman, the bailiff indicates that you request access to the transcript?

FOREMAN: We want to review portions of the testimony.

THE COURT: I'll have to give you this instruction. There is no transcript at this point. You and the other jurors will have to take your recollection of the evidence as you recall it and as you can agree upon that recollection in your deliberations.

Ashe, 314 N.C. at 33, 331 S.E.2d at 655-56. The defendant was convicted and appealed. *Id.* at 29, 331 S.E.2d at 652. On appeal, the defendant argued that "the trial court erred in failing to exercise its discretion in determining whether the jury could review the evidence and in not having all jurors summoned to the courtroom so that his response could

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be communicated firsthand to them all rather than to the foreman alone.” *Id.* at 33, 331 S.E.2d at 656. The Supreme Court noted that N.C. Gen. Stat. § 15A-1233(a)

imposes two duties upon the trial court when it receives a request from the jury to review evidence. First, the court must conduct all jurors to the courtroom. Second, the trial court must exercise its discretion in determining whether to permit requested evidence to be read to or examined by the jury together with other evidence relating to the same factual issue Insofar as the statute requires the trial court to summon all jurors to the courtroom, it is a codification of a long-standing practice in the trial courts of this state.

Id. at 34, 331 S.E.2d at 656. The Supreme Court went on to hold that N.C. Gen. Stat. § 15A-1233,

requires all jurors to be returned to the courtroom when the jury “requests a review of certain testimony or other evidence.” We are satisfied the statute means that all jurors must be present not only when the request is made, but also when the trial court responds to the request, whatever that response might be.

Id. at 36, 331 S.E.2d at 657. By application of this rule, the Court held that “for the trial court in this case to hear the jury foreman’s inquiry and to respond to it without first requiring the presence of all jurors was an error in violation of N.C.G.S. § 15A-1233.” *Id.* The Court further explained that

[o]ur jury system is designed to insure that a jury’s decision is the result of evidence and argument offered by the contesting parties under the control and guidance of an impartial judge and in accord with the judge’s instructions on the law. All these elements of the trial should be viewed and heard simultaneously by all twelve jurors. To allow a jury foreman, another individual juror, or anyone else to communicate privately with the trial court *regarding matters material to the case* and then to relay the court’s response to the full jury is inconsistent with this policy. The danger presented is that the-24-person, even the jury foreman, having alone made the request of the court and heard the court’s response firsthand, may through misunderstanding, inadvertent editorialization, or an intentional misrepresentation, inaccurately relay the jury’s request or the court’s response, or both, to the defendant’s detriment.

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Then, each juror, rather than determining for himself or herself the import of the request and the court's response, must instead rely solely upon their spokesperson's secondhand rendition, however inaccurate it may be.

Id. (Emphasis added.)

Here, the jury made a request for evidence to the trial court during deliberations.

THE COURT: Let the record reflect the jury has asked a question and made a request actually, and that is may they see the picture of the accused, which was Exhibit—was it 3?

THE STATE: I'd have to look. I'm sorry.

DEFENSE COUNSEL: Yes, Your Honor.

THE COURT: I think it was State's Exhibit Number 3. Does anyone have a question?

DEFENSE COUNSEL: No objection, Your Honor

THE STATE: No objection.

THE COURT: Nor does the Court have any. So I want to ask that it be given to them with the instruction that *we need that back*.

THE BAILIFF: Okay.

(Emphasis Added.) As the trial court did not bring the jury back into the courtroom for the jury's request of evidence and its ruling on that request, it technically violated the N.C. Gen. Stat. § 15A-1233(a) mandate that "for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom." *See Ashe*, 314 N.C. at 36, 331 S.E.2d at 657. However, we fail to see how that the trial court's relayed instruction was prejudicial to defendant. In *Ashe*, the trial court allowed a communication "regarding matters material to the case" when he instructed the jury foreman to tell the other jurors that "[t]here is no transcript at this point. You and the other jurors will have to take your recollection of the evidence as you recall it and as you can agree upon that recollection in your deliberations." *Ashe*, 314 N.C. at 33, 331 S.E.2d at 655-56. In contrast, here, we cannot say that "we need that back" was a communication "regarding matters material to the case" as it did not address issues regarding the recollection of evidence during deliberations, like *Ashe*, or any other matter relevant to the jury's deliberations but was merely to inform the jurors that the

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court wanted the exhibit returned to the court after the jury was finished reviewing it. Unlike the court in *Ashe*, the trial court here did not ask the jury foreman to relay the message but directed the bailiff to deliver the exhibit and to inform the jury to send it back. Unlike a jury foreman, the bailiff is a sworn officer of the court whose duties normally include conducting the jury to and from the jury room and conveying certain communications between the trial court and the jury. We cannot discern how the bailiff's delivery of the exhibit to the jury, with the instruction that it would need to be returned to the trial court, could be detrimental to defendant's case, and, accordingly, we hold that the trial court's error was not prejudicial to defendant. *See Ashe*, 314 N.C. at 39, 331 S.E.2d at 659.

V. Violation of N.C. Gen. Stat. § 15A-1221(b)

[4] Defendant next contends that in violation of N.C. Gen. Stat. § 15A-1221(b) the trial court permitted the State to read a portion of defendant's indictment to the jury. Defendant argues for review pursuant to N.C. Gen. Stat. § 15A-1443(a). However, defendant has waived this argument because he failed to object to the State's introduction of this evidence at trial, pursuant to N.C.R. App. P. 10(b)(1), N.C. Gen. Stat. § 15A-1446, or N.C. Gen. Stat. § 15A-1443(a), *see Parker*, 354 N.C. at 290, 553 S.E.2d at 901, and defendant raises no argument as to plain error. *See Harrington*, 171 N.C. App. at 32, 614 S.E.2d at 349. Accordingly, defendant's argument is not properly preserved for our review.

VI. Evidence Regarding the Character of the Neighborhood

[5] Defendant next contends that the trial court committed plain error by allowing State's witness Officer Melley to characterize the neighborhood where the drug transaction allegedly occurred as a "high drug location" and an "open air market for drugs[,] as these statements amounted to inadmissible hearsay and "probably affected the outcome because the jury had a hard time rendering a unanimous verdict." As defendant did not object to the introduction of this evidence at trial, we review this evidentiary argument under a "plain error" standard of review. *See* N.C.R. App. P. 10(c)(4); *Odom*, 307 N.C. at 660, 300 S.E.2d at 378.

Even assuming *arguendo* that it was error for the trial court to allow the introduction of the detective's testimony characterizing the neighborhood, we conclude that it did not rise to the level of plain error, as the record in the case *sub judice* contains overwhelming evidence of defendant's guilt. Defendant was convicted of delivering a counterfeit

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controlled substance pursuant to N.C. Gen. Stat. § 90-95(a)(2) (2007), which states that it is unlawful for any person “To create, sell or deliver, or possess with intent to sell or deliver, a counterfeit controlled substance[.]” N.C. Gen. Stat. § 90-95(a)(2) (2007). According to N.C. Gen. Stat. § 90-87 “counterfeit controlled substance” means

b. Any substance which is by any means intentionally represented as a controlled substance. It is evidence that the substance has been intentionally misrepresented as a controlled substance if the following factors are established:

1. The substance was packaged or delivered in a manner normally used for the illegal delivery of controlled substances.
2. Money or other valuable property has been exchanged or requested for the substance, and the amount of that consideration was substantially in excess of the reasonable value of the substance.
3. The physical appearance of the tablets, capsules or other finished product containing the substance is substantially identical to a specified controlled substance.

N.C. Gen. Stat. § 90-87 (2007)². In the context of the crimes enumerated in N.C. Gen. Stat. § 90-95, “[a] sale is a *transfer* of property for a specified price payable in money.” *State v. Creason*, 313 N.C. 122, 129, 326 S.E.2d 24, 28 (1985). Here, Detective Melley testified that she gave defendant \$20 and defendant handed her a substance that he represented was crack cocaine. Detective Melley testified that the substance was handed to her not packaged because “[t]ypically, when you’re just buying a single rock of crack cocaine, it is not packaged, though it can be; but more frequently than not it’s not packaged. It’s just one single rock that’s handed[.]” Detective Melley testified that since the substance was not cocaine it had “no value[.]” even though she paid \$20 for it. Detective Melley described this substance as “an off-white rock-

2. N.C. Gen. Stat. § 90-87(a) addresses substances in which “the container or labeling of which, without authorization, bears the trademark, trade name, or other identifying mark, imprint, number, or device, or any likeness thereof, of a manufacturer, distributor, or dispenser other than the person or persons who in fact manufactured, distributed, or dispensed such substance and which thereby falsely purports, or is represented to be the product of, or to have been distributed by, such other manufacturer, distributor, or dispenser[.]” Here, there was no evidence presented that the substance that Detective Melley received from defendant contained any “trademark, trade name, or other identifying mark, imprint, number, or device[.]” and therefore, this subsection is not relevant to this case.

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like substance that was similar in appearance to crack cocaine.” Defendant was also identified at trial by Detective Melley and Detective Diamont as the person that sold the counterfeit crack to Detective Melly. Corporal Knight also identified defendant as the person he stopped and searched based on a description from Detective Melley. In light of the substantial evidence of defendant’s guilt, we find it unlikely that the jury’s verdict would have been different if the evidence as to the nature of the neighborhood had been excluded and so we conclude defendant has failed to show plain error.

VII. Violations of North Carolina Rules of Evidence 401 and 403

[6] Lastly, defendant contends that the trial court erred in the habitual felon phase of his trial by refusing to redact on the transcript of plea for defendant’s predicate felony case No. 01 CRS 54630, in which defendant was convicted of assault with a deadly weapon inflicting serious injury (“AWDWISI”). Defendant requested redaction of two questions and responses on the transcript of plea: “4.(a). Are you now under the influence of alcohol, drugs, narcotics, medicines, pills, or any other intoxicants?”, to which defendant answered “yes” and question 4.(b) “When was the last time you used or consumed any such substances?”, to which defendant answered, “today[.]” Defendant argues that the admission of this evidence was in violation of North Carolina Rules of Evidence 401 and 403 because “[e]vidence that [defendant] consumed a substance on the day he pled guilty to a predicate felony had no tendency to prove the only fact at issue: whether [defendant] was convicted of that offense[.]” and “its admission was unduly prejudicial.” At trial, defendant objected to the admission of this evidence and the trial court overruled his objection. Therefore, this argument is properly preserved for our review. *See* N.C.R. App. P. 10(b)(1).

In reviewing a trial court’s ruling pursuant to Rule 401, we have previously noted that

[a]lthough the trial court’s rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal. Because the trial court is better situated to evaluate whether a particular piece of evidence tends to make the existence of a fact of consequence more or less probable, the appropriate standard of review for a trial court’s ruling on relevancy pursuant to Rule 401 is not as deferential as the ‘abuse of discretion’ standard which applies to rulings made pursuant to Rule 403.

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State v. Tadeja, 191 N.C. App. 439, 444, 664 S.E.2d 402, 407 (2008) (quoting *Dunn v. Custer*, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004)). Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” N.C. Gen. Stat. § 8C-1, Rule 401 (2007). “[E]vidence is relevant if it has any logical tendency, however slight, to prove a fact in issue in the case.” *Tadeja*, 191 N.C. App. at 444, 664 S.E.2d at 407 (quoting *State v. Hannah*, 312 N.C. 286, 294, 322 S.E.2d 148, 154 (1984)). “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” N.C. Gen. Stat. § 8C-1, Rule 403 (2007).

A person may be charged as a habitual felon if he has been convicted of or pled guilty to three felony offenses. N.C. Gen. Stat. § 14-7.1 (2007). For a habitual felon charge, the prior felony convictions of a defendant may be proven by stipulation of the parties or by the original, certified copy, or true copy of the court record of the prior felony conviction, pursuant to N.C. Gen. Stat. § 14-7.4. *State v. Gant*, 153 N.C. App. 136, 143, 568 S.E.2d 909, 913 (2002). “[T]he preferred method for proving a prior conviction includes the introduction of the judgment itself into evidence.” *State v. Maynard*, 311 N.C. 1, 26, 316 S.E.2d 197, 211, *cert. denied*, 469 U.S. 963, 83 L. Ed. 2d 299 (1984).

Here, the State introduced a “certificate of true copy” of the judgment and commitment, but also introduced the magistrate’s order (form AOC-CR-116), the indictment (form AOC-CR-122), an order for arrest (form AOC-CR-217), and the “transcript of plea” (form AOC-CR-300) from Forsyth County file No. 01 CRS 54630. There were various redactions on all of these documents, but the language on the “transcript of plea” which is the subject of defendant’s argument here was not redacted. In its brief, the State does not attempt to demonstrate how evidence that the defendant had “used or consumed” “alcohol, drugs, narcotics, medicines, pills, or any other intoxicants” on the day defendant had entered his plea may be relevant to the issue to be determined by the jury as to defendant’s status as a habitual felon. We agree that the challenged statements on the “transcript of plea” are irrelevant, as they do not have “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” *See* N.C. Gen. Stat. § 8C-1, Rule 401.

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Although defendant is correct that his answers to questions 4(a) and 4(b) on the “transcript of plea” were irrelevant to the determination which the jury was to make in this case, which was confined to whether defendant had previously been convicted of three felonies, including AWDWISI in file No. 01 CR 54630, defendant has failed to demonstrate how this evidence prejudiced him. Our Supreme Court has held that

[d]efendant bears the burden of proving the testimony was erroneously admitted and he was prejudiced by the erroneous admission. N.C.G.S. § 15A-1443(a) (1997). “The admission of evidence which is technically inadmissible will be treated as harmless unless prejudice is shown such that a different result likely would have ensued had the evidence been excluded.” *State v. Gappins*, 320 N.C. 64, 68, 357 S.E.2d 654, 657 (1987).

State v. Moses, 350 N.C. 741, 762, 517 S.E.2d 853, 867 (1999), *cert. denied*, 528 U.S. 1124, 145 L. Ed. 2d 826 (2000). Defendant does not challenge the validity of any of the three predicate felony convictions which led to his habitual felon status and does not challenge the judgment and commitment orders from those felonies. Given the overwhelming and uncontradicted evidence of the three felony convictions, there is essentially no likelihood that a “different result . . . would have ensued[,]” *see id.*, if the trial court had redacted “transcript of plea” questions 4(a) and (b) and/or defendant’s answers to those questions. Defendant’s argument is therefore without merit. Although other documents, such as a transcript of plea, could be used to prove a conviction, we agree that, as our Supreme Court stated, the “*preferred method* for proving a prior conviction includes the introduction of the judgment itself into evidence.” *Maynard*, 311 N.C. at 26, 316 S.E.2d at 211 (emphasis added).

VIII. Conclusion

For the foregoing reasons, we hold that defendant received a trial free from prejudicial error.

NO PREJUDICIAL ERROR.

Judges BRYANT and ELMORE concur.

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SCOTT ELLISON, JAMES ELLISON AND PAUL ELLISON, PLAINTIFFS v. C. RUDY
ALEXANDER, DEFENDANT

No. COA09-1240

(Filed 19 October 2010)

1. Appeal and Error— interlocutory order—arbitration denied —substantial right affected

A challenge to the denial of defendant's motion to stay proceedings and compel arbitration was properly before the Court of Appeals even though the order was interlocutory. The denial of arbitration involved a substantial right which might have been lost if the appeal was delayed.

2. Arbitration and Mediation— arbitration clause—Subscription and Shareholder Agreements—enforceable

Defendant was entitled to enforce an arbitration clause in Subscription and Shareholder Agreements (SSAs) and the trial court's order denying defendant's motion to compel arbitration was reversed. Plaintiffs' claims arose in connection with the SSAs and defendant was acting in his capacity as a representative of the company when he allegedly made the misrepresentations upon which the claims rested.

Appeal by defendant from judgment entered 2 July 2009 by Judge Linwood O. Foust in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 February 2010.

Martin & Jones, PLLC, by Hoyt G. Tessner, and Walter McBrayer Wood, for Plaintiff-appellees.

Rayburn Cooper & Durham, P.A., by Ross R. Fulton and Daniel J. Finegan, for Defendant-appellants.

ERVIN, Judge.

Defendant C. Rudy Alexander appeals from an order denying his motions to dismiss, for judgment on the pleadings, and to stay the proceedings stemming from the claims advanced by Plaintiffs Scott Ellison, James Ellison and Paul Ellison and to require that those claims be submitted for arbitration on the grounds that Defendant is entitled to enforce arbitration agreements between Plaintiffs and The

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Elevator Channel, Inc.” (The Elevator Channel).¹ After careful consideration of Defendant’s appellate challenges to the trial court’s order in light of the record and the applicable law, we reverse.

I. Factual Background

On 22 September 2008, Plaintiffs filed a complaint against Defendant seeking compensatory and punitive damages for fraud, constructive fraud, breach of fiduciary duty, and unfair and deceptive trade practices.² According to Plaintiffs, Defendant was the chief executive officer (CEO) and director of a company known as The Elevator Channel.³ Plaintiffs’ claims against Defendant stemmed from allegations that he had induced them to invest in The Elevator Channel by misrepresenting certain material facts about his personal background and other matters. More particularly, Plaintiffs allege that Defendant falsely represented that “[h]e was a college graduate with degrees in marketing and finance;” that “[h]e was a vice-president in a multinational corporation in charge of international accounts;” that “[h]e ran a successful and financially sound corporation;” that “[o]ngoing investments from other investors for the benefit of The Elevator Channel, Inc. were being investigated and completed;” that “[t]he investments in The Elevator Channel, Inc. [were] being used for the benefit of the corporation and its shareholders;” that “[h]e and his family had made personal financial investments in The Elevator Channel, Inc.,” that “[h]e has extensive international experience in operation, management, operations, finance, strategic planning, business and product development, sales and marketing in both public and start-up companies;” that “[h]e [has] recruited and assembled a strong management team, developed the company strategy and implemented an operating plan;” that “[h]e was successfully installing The Elevator Channel, Inc. proprietary information in elevator cabs in the Charlotte area;” and that “[t]he Elevator Channel would be profitable by the third quarter of 2006.” As a result of these alleged

1. According to the Complaint, The Elevator Channel may also be known as 11 Giraffes Company. However, consistently with the approach taken in the parties’ briefs, we will refer to the corporation in question as “The Elevator Channel” throughout the remainder of this opinion.

2. In the course of the proceedings in the trial court, Plaintiffs conceded that “the [] unfair [and deceptive] trade [] practices claim does not apply to the transactions at issue herein and consent[ed] to dismissal of their UDTPA claim.” As a result, Plaintiff’s unfair and deceptive trade practices claim is not before us on appeal.

3. Defendant’s answer described The Elevator Channel at the time of Plaintiffs’ investments as the ‘network operator for a digital advertising network’

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misrepresentations, Plaintiffs claimed to have “justifiably relied on Defendant’s misrepresentations of material facts to their detriment” and to have “suffered damages in excess of \$10,000.00” as a result of Defendant’s conduct.

On 18 December 2008, Defendant filed a motion seeking the dismissal of Plaintiffs’ complaint. On 26 February 2009, Defendant filed an answer to Plaintiffs’ complaint in which he denied the material allegations of Plaintiffs’ complaint, sought dismissal of Plaintiffs’ claims, and asserted that, if the proceedings that Plaintiffs had initiated were not dismissed, they should be “stayed, pending arbitration of Plaintiffs’ claims” pursuant to an arbitration clause contained in Section VII of the Subscription and Shareholder Agreements (SSAs) signed by Plaintiffs on each occasion when they purchased shares in The Elevator Channel. On 26 February 2009, Defendant filed a separate motion “to stay in favor of binding arbitration or, in the alternative, for judgment on the pleadings.” On 12 March 2009, Plaintiffs signed a memorandum in opposition to Defendant’s dismissal motion and a memorandum in opposition to Defendant’s request for a stay.⁴

On 17 March 2009, the trial court conducted a hearing on Defendant’s motions. On 2 July 2009, the trial court entered an order denying Defendant’s motions for dismissal and judgment on the pleadings and denying Defendant’s motion for a stay and to compel arbitration on the grounds that “a valid agreement to arbitrate the disputes at issue did not exist among the parties.” Defendant noted an appeal to this Court from the trial court’s order.

II. Legal Analysis

A. Appealability

[1] “A judgment is either interlocutory or the final determination of the rights of the parties.” N.C. Gen. Stat. § 1A-1, Rule 54(a) (2009). “An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.” *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). The order from which Defendant has appealed is interlocutory in nature.

“As a general rule, interlocutory orders are not immediately appealable.” *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558,

4. The versions of Plaintiffs’ memoranda contained in the record on appeal lack a file stamp establishing when or if they were filed with the court.

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681 S.E.2d 770, 773 (2009) (citing *Davis v. Davis*, 360 N.C. 518, 524, 631 S.E.2d 114, 119 (2006)). However, immediate appeal of interlocutory orders and judgments is available when the interlocutory order or judgment affects a substantial right under N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1). *Sharpe v. Worland*, 351 N.C. 159, 161-62, 522 S.E.2d 577, 579 (1999), *disc. review denied*, 352 N.C. 150, 544 S.E.2d 228 (2000). “[A]n order denying arbitration is immediately appealable because it involves a substantial right, the right to arbitrate claims, which might be lost if appeal is delayed.” *Martin v. Vance*, 133 N.C. App. 116, 119, 514 S.E.2d 306, 308 (1999). Thus, Defendant’s challenge to the denial of his motion to stay the proceedings and compel arbitration is properly before us.

B. Standard of Review

[2] The ultimate issue raised by Defendant’s appeal is whether the trial court erred by denying Defendant’s motion to compel arbitration.

The determination of whether a dispute is subject to arbitration involves a two pronged analysis; the court must ascertain both (1) whether the parties had a valid agreement to arbitrate, and also (2) whether “the specific dispute falls within the substantive scope of that agreement.”

Raspet v. Buck, 147 N.C. App. 133, 136, 554 S.E.2d 676, 678 (2001) (quoting *PaineWebber Inc. v. Hartmann*, 921 F.2d 507, 511 (3d Cir. 1990)). “The law of contracts governs the issue of whether an agreement to arbitrate exists.” *Brown v. Centex Homes*, 171 N.C. App. 741, 744, 615 S.E.2d 86, 88 (2005) (citing *Routh v. Snap-On Tools Corp.*, 108 N.C. App. 268, 271, 423 S.E.2d 791, 794 (1992)). In addressing a request to compel arbitration, we recognize that:

Because the duty to arbitrate is contractual, only those disputes which the parties agreed to submit to arbitration may be so resolved. To determine whether the parties agreed to submit a particular dispute or claim to arbitration, we must look at the language in the agreement, *viz.*, the arbitration clause, and ascertain whether the claims fall within its scope. In so doing, “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” This is so because public policy in this State, like federal policy, favors arbitration. Because federal policy and the policy of this State are the same in this regard, it is appropriate to look to federal cases for guidance in determining whether plaintiff’s claims fall within the scope of the arbitration clause.

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Rodgers Builders, Inc. v. McQueen, 76 N.C. App. 16, 23-24, 331 S.E.2d 726, 731 (1985) (citing *Coach Lines v. Brotherhood*, 254 N.C. 60, 67-68, 118 S.E.2d 37, 43 (1961), and quoting *Cyclone Roofing Co. v. LaFave Co.*, 312 N.C. 224, 229, 321 S.E.2d 872, 876 (1984), *disc. review denied*, 315 N.C. 590, 341 S.E.2d 29 (1986)). Thus, the “interpretation of the terms of an arbitration agreement [is] governed by contract principles” as well. *Trafalgar House Constr., Inc. v. MSL Enters., Inc.*, 128 N.C. App. 252, 256, 494 S.E.2d 613, 616 (1998). “Although we are not bound by federal case law, we may find their analysis and holdings persuasive.” *Brown*, 171 N.C. App. at 744, 615 S.E.2d at 88 (citing *Huggard v. Wake County Hosp. Sys.*, 102 N.C. App. 772, 775, 403 S.E.2d 568, 570 (1991), *aff’d per curiam*, 330 N.C. 610, 411 S.E.2d 610 (1992)). “The trial court’s findings regarding the existence of an arbitration agreement are conclusive on appeal where supported by competent evidence, even where the evidence might have supported findings to the contrary.” *Sciolino v. TD Waterhouse Investor Servs.*, 149 N.C. App. 642, 645, 562 S.E.2d 64, 66 (2002) (citing *Routh*, 108 N.C. App. at 272, 423 S.E.2d at 794), *disc. review denied*, 356 N.C. 167, 568 S.E.2d 611 (2002). However, “[t]he trial court’s conclusion as to whether a particular dispute is subject to arbitration is a conclusion of law, reviewable *de novo* by the appellate court.” *Raspel*, 147 N.C. App. at 136, 554 S.E.2d at 678.

C. Propriety of Denial of Motion to Compel Arbitration

On appeal, Defendant argues that the trial court “erred by failing to compel arbitration of the disputes and stay the litigation.” We agree.

A careful review of the record demonstrates that a number of pertinent facts, including the following, are not in dispute between the parties:

Defendant is The Elevator Channel’s CEO and a Board member.

Plaintiffs each purchased stock in The Elevator Channel on several occasions.

In connection with each purchase of stock, Plaintiffs signed an SSA, a contract between The Elevator Channel and the Plaintiff-signatories.

Defendant signed the SSAs on behalf of The Elevator Channel.⁵

5. Defendant also signed two SSAs in a limited individual capacity. However, we can resolve the issues raised by Defendant’s appeal without the necessity for addressing whether Defendant was entitled to enforce the arbitration clause in the two SSAs which he signed in his individual capacity.

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The SSAs are identical in all material respects and each includes an arbitration clause stating, in pertinent part, that “[a]ll disputes and claims arising in connection with this Agreement shall be finally settled by binding arbitration under the rules of the American Arbitration Association.”

In their complaint, Plaintiffs assert that Defendant acted “in violation of his responsibilities and fiduciary duties as a shareholder, director and/or officer of The Elevator Channel” and “repeatedly breached his duties of due care, loyalty and good faith to Plaintiffs.” More specifically, Plaintiffs allege that, for the purpose of inducing Plaintiffs to invest in The Elevator Channel, Defendant materially misrepresented his personal background and qualifications to run the company. According to Plaintiffs, over “the course of approximately three years in reliance on Defendant’s representations, [Plaintiffs] invested with Defendant, based upon Defendant’s representations, in The Elevator Channel, Inc.” In addition, Plaintiffs alleged that Defendant engaged in acts of corporate malfeasance and failed to act in the best interests of The Elevator Channel.⁶ However, Plaintiffs expressly disclaim any attempt to redress corporate wrongs or to assert corporate rights in this case, claiming instead that their claims for fraud, breach of fiduciary duty, and constructive fraud stem from Defendant’s individual actions and do not involve a claim against the corporation or its officers. Thus, the ultimate issue before this Court is the extent, if any, to which the trial court erred by denying Defendant’s motion to compel the arbitration of claims that Plaintiffs have attempted to assert against Defendant in his individual capacity. In order to properly resolve this question, we need to examine the nature of the specific claims that Plaintiffs have attempted to assert against Defendant.

6. Plaintiffs’ claims of corporate malfeasance were not addressed during the trial court’s consideration of Defendant’s motion. “A ‘derivative proceeding’ is a civil action brought by a shareholder ‘in the right of’ a corporation, N.C. Gen. Stat. § 55-7-40.1 [(1999)], while an individual action is one a shareholder brings to enforce a right which belongs to him personally.” *Norman v. Nash Johnson & Sons’ Farms, Inc.*, 140 N.C. App. 390, 395, 537 S.E.2d 248, 253 (2000) (citing *Way v. Sea Food Co.*, 184 N.C. 171, 174, 113 S.E. 781, 782 (1922)), *disc. review denied*, 353 N.C. 378, 547 S.E.2d 13 (2001). Moreover, “[u]nder North Carolina law, directors of a corporation generally owe a fiduciary duty to the corporation, and where it is alleged that directors have breached this duty, the action is properly maintained by the corporation rather than any individual creditor or stockholder.” *Governor’s Club, Inc. v. Governor’s Club Ltd. P’ship*, 152 N.C. App. 240, 248, 567 S.E.2d 781, 786-87 (2002) (emphasis omitted) (citations omitted), *aff’d per curiam*, 357 N.C. 46, 577 S.E.2d 620 (2003). As a result, given that Plaintiffs have not brought forward any issue relating to their corporate malfeasance claim and since such claims may need to be addressed in a derivative action, we need not address Plaintiffs’ corporate malfeasance claims at this time.

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1. Legal Nature of Plaintiffs' Claims

As a preliminary matter, we note that the only specific transaction at issue in the complaint is Plaintiffs' purchase of stock in The Elevator Channel. Plaintiffs' complaint does not allege, for example, that Plaintiffs lost money on their investment in The Elevator Channel; that any of the Plaintiffs worked for The Elevator Channel; that any of the Plaintiffs bought or sold products or services from The Elevator Channel; or that any of the Plaintiffs engaged in other business transactions with The Elevator Channel. Therefore, Plaintiffs' allegation to the effect that Defendant misled them into investing in The Elevator Channel is the only factual basis for their claims for fraud, breach of fiduciary duty, and constructive fraud.

a. Actual Fraud

"[T]he following essential elements of actual fraud are well established: '(1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party.'" *Forbis v. Neal*, 361 N.C. 519, 526-27, 649 S.E.2d 382, 387 (2007) (quoting *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974)). According to Plaintiffs, Defendant "made misrepresentations of material facts to induce Plaintiffs' investments." Plaintiffs further contend that "Defendant's superior position on the Board of Directors and as CEO of The Elevator Channel, Inc." prevented Plaintiffs from learning of Defendant's misrepresentations. As a result, the fundamental accusation underlying Plaintiffs' claim that Defendant engaged in actual fraud is their assertion that Defendant made active misrepresentations that caused them to invest in The Elevator Channel and that Defendant's role with the corporation prevented them from learning of his deceptive conduct.

b. Breach of Fiduciary Duty

In addition, Plaintiffs sought damages from Defendant for breach of fiduciary duty.

For a breach of fiduciary duty to exist, there must first be a fiduciary relationship between the parties. Such a relationship has been broadly defined by this Court as one in which "there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence . . . and in which

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there is confidence reposed on one side, and *resulting domination and influence on the other.*”

Dalton v. Camp, 353 N.C. 647, 651, 548 S.E.2d 704, 707-08 (2001) (citing *Curl v. Key*, 311 N.C. 259, 264, 316 S.E.2d 272, 275 (1984), and quoting *Abbutt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931)). “ [I]n North Carolina . . . there are two types of fiduciary relationships: (1) those that arise from legal relations such as attorney and client, broker and client . . . partners, principal and agent, trustee and *cestui que trust*, and (2) those that exist as a fact, in which there is confidence reposed on one side, and the resulting superiority and influence on the other.’ ” *S.N.R. Mgmt. Corp. v. Danube Partners* 141, LLC, 189 N.C. App. 601, 613, 659 S.E.2d 442, 451 (2008) (quoting *Rhone-Poulenc Agro S.A. v. Monsanto Co.*, 73 F. Supp. 2d 540, 546 (M.D.N.C. 1999)). The primary fiduciary duty upon which Plaintiffs rely in asserting this claim against Defendant stems from his role as “shareholder, director and/or officer” of The Elevator Channel. The violation of such a duty would clearly involve a breach of a relationship of trust and confidence sufficient to support a breach of fiduciary duty claim.

c. Constructive Fraud

“To assert a claim of constructive fraud, plaintiff must allege: ‘(1) a relationship of trust and confidence, (2) *that the defendant took advantage of that position of trust in order to benefit himself*, and (3) that plaintiff was, as a result, injured,’ ” so that “ ‘[t]he primary difference between pleading a claim for constructive fraud and one for breach of fiduciary duty is [the requirement] that the defendant benefit himself.’ ” *Clay v. Monroe*, 189 N.C. App. 482, 488, 658 S.E.2d 532, 536 (2008) (quoting *White v. Consolidated Planning, Inc.*, 166 N.C. App. 283, 294, 603 S.E.2d 147, 156 (2004), *disc. review denied*, 359 N.C. 286, 610 S.E.2d 717 (2005)). As a result of the fact that the part of Plaintiffs’ complaint that attempts to assert a claim for constructive fraud incorporates the earlier paragraphs of their complaint, we will assume that Plaintiffs have correctly stated a claim sounding in constructive fraud stemming from Defendant’s breach of his fiduciary duties as CEO and director.

d. Essence of Plaintiffs’ Claims

Thus, Plaintiffs’ fraud, breach of fiduciary duty, and constructive fraud claims are all based on allegations that Defendant, who was an officer and director of The Elevator Channel, misrepresented his education, financial background, and other qualifications in order to

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induce them to invest in The Elevator Channel, a corporation which he served as officer and director. Plaintiffs' assertion that Defendant acted in his "personal" or individual capacity rests solely on the claim that Defendant allegedly misrepresented his "personal" background in the process of inducing them to invest in The Elevator Channel. Plaintiffs have cited no authority for the proposition that the factual content of alleged misrepresentations or the fact that a party has been sued individually rather than for the purpose of supporting an attempt to establish vicarious liability determines the capacity in which certain representations were made, and we know of none. On the contrary, at the time that Defendant made the representations upon which Plaintiffs' claims for fraud, breach of fiduciary duty, and constructive fraud rest, the allegations of the complaint indicate that he was acting in his capacity as a director and officer of The Elevator Channel given that he was inducing Plaintiffs to invest in that entity. Thus, we conclude that the allegations of Plaintiffs' complaint, if taken as true, amount to a contention that Defendant's liability stemmed from conduct undertaken in his corporate, rather than his personal, capacity.

2. Arbitrability of Plaintiffs' Claims

As we have already established, "[w]hether a dispute is subject to arbitration involves a two pronged analysis; the court must ascertain both (1) whether the parties had a valid agreement to arbitrate, and also (2) whether 'the specific dispute falls within the substantive scope of that agreement.'" *Sloan Fin. Grp., Inc. v. Beckett*, 159 N.C. App. 470, 478, 583 S.E.2d 325, 330 (2003) (quoting *PaineWebber Inc.*, 921 F.2d at 511, *aff'd*, 358 N.C. 146, 593 S.E.2d 583 (2004)). Thus, a proper resolution of this case requires an application of this two-pronged test in light of the relevant materials in the record.

a. Relevant SSA Provisions

Immediately above the portion of each SSA spelling out its substantive terms is a two-paragraph disclaimer set out in capital letters warning signatories to the SSA that, before investing, "investors must rely on their own examination of the issuer and the terms of the offering, including the merits and risks involved." The disclaimer also warns that the securities are not recommended or guaranteed by any government agency and are subject to transfer and resale restrictions. According to each SSA, The Elevator Channel has made a private offering of company shares "to a limited number of selected persons" who "hereby subscribe[] to purchase certain shares of stock."

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After a list of representations by The Elevator Channel, the SSAs describe the representations that each subscriber is required to make, including representations that:

1. Subscriber is an “accredited investor” . . . meaning that Subscriber . . . has (a) net worth in excess of \$1,000,000, either individually or jointly with that person’s spouse, or (b) individual gross income in excess of \$200,000 in each of the most two recent years . . . and has reasonable expectation of reaching the same income level in this year. . . .
2. Subscriber has been furnished and has read carefully the Offering Memorandum. In evaluating the suitability of an investment in the Corporation, Subscriber has not relied upon any representations or other information from the Corporation or any of its agents that is in any way inconsistent with Offering Memorandum. (emphasis added).
3. Subscriber has . . . to the extent deemed necessary, discussed the suitability of an investment with Subscriber’s legal, tax and financial advisors. . . .
4. Subscriber has had an opportunity to ask questions and receive answers from duly designated representatives of the Corporation . . . and has been afforded an opportunity to examine such information . . . for the purpose of answering any questions . . . concerning the business and affairs of the Corporation.
5. SUBSCRIBER RECOGNIZES THAT THE CORPORATION HAS LITTLE FINANCIAL OR OPERATING HISTORY. SUBSCRIBER UNDERSTANDS THAT A PURCHASE OF SHARES OF THE CORPORATION INVOLVES A HIGH DEGREE OF RISK AND THAT SUBSCRIBER MAY LOSE HIS ENTIRE INVESTMENT. . . . (emphasis in original)

The SSAs also address issues such as the rights of minority shareholders, share transfer and sale limitations, and other questions relating to the purchase and distribution of shares that are not relevant to this appeal. Section VII of each SSA then provides that:

All disputes and claims arising in connection with this Agreement shall be finally settled by binding arbitration under the rules of the American Arbitration Association.

In addition, Section XI of each SSA contains an integration clause providing that:

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This agreement contains the entire understanding of the parties. There are no representations, warranties, promises, covenants or undertakings other than those hereinabove contained.

Finally, immediately above the signature lines, the SSAs state that:

The undersigned hereby executes this Signature Page . . . for the purpose of subscribing to purchase shares of The Elevator Channel, Inc. and hereby agrees to pay the purchase price . . . [and] hereby adopts, accepts, ratifies, confirms and agrees to be bound by all the terms and provisions of [the SSA].

In light of these contractual provisions, we must resolve two fundamental questions: (1) does Plaintiffs' complaint assert "disputes and claims arising in connection with" the SSAs?; and, (2) if so, may Defendant enforce the arbitration clause in light of the facts present here?

b. Legal Analysis

As discussed above, Plaintiffs' complaint alleges that their investment in The Elevator Channel was induced by Defendant's misrepresentations. The "gravamen of [their] Complaint is that they would not have invested in The Elevator Channel in the absence of Defendant's false representations about himself personally." Thus, Plaintiffs' claims stem from the circumstances surrounding their purchase of stock in The Elevator Channel, including whether Defendant misled them into making that investment. As we have previously demonstrated, the SSA spells out the terms and conditions under which Plaintiffs purchased shares in The Elevator Channel. Thus, Plaintiffs' claims are clearly "connected" with the SSAs, since the execution of those agreements was the vehicle by which Plaintiffs effectuated their decision to invest in The Elevator Channel.

Secondly, we conclude that Defendant may properly invoke the arbitration clause of the SSAs despite the fact that he was not, individually, a signatory to that document. Plaintiffs argue that, despite the fact that Defendant signed the SSAs on behalf of The Elevator Channel, they have asserted claims against him individually and that this fact precludes him from enforcing the arbitration clause. However, "[t]he obligation and entitlement to arbitrate 'does not attach only to one who has personally signed the written arbitration provision.' Rather, '[w]ell-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other par-

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ties.’ ” *Washington Square Securities, Inc. v. Aune*, 385 F.3d 432, 435 (4th Cir. 2004) (quoting *Int’l. Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416-17 (4th Cir. 2000)).

In *Brown*, plaintiffs sued a real estate agent, and the firm by which she was employed, based on statements made by the agent prior to plaintiffs’ purchase of property. *Brown*, 171 N.C. App. at 742-43, 615 S.E.2d at 87, According to this Court, despite the fact that the agent had not signed the sales contract, she was entitled to enforce an arbitration clause contained in that agreement:

“Non-signatories to an arbitration agreement may be bound by or enforce an arbitration agreement executed by other parties under theories arising out of common law principles of contract and agency law. Under the theory of agency, an agent can assume the protection of the contract which the principal has signed. Courts have applied this principle to allow for non-signatory agents to avail themselves of the protection of their principal’s arbitration agreement.”

Id. at 745, 615 S.E.2d at 88 (quoting *Collie v. Wehr Dissolution Corp.*, 345 F. Supp. 2d 555, 562 (M.D.N.C. 2004)). Similarly, in *Collie*, the Court concluded:

While the individual defendants did not sign the Agreement . . . their status as agents of the Corporate Defendant enables them to use the Agreement to compel arbitration. “Such a finding also has the result of preventing an unwanted result: the circumvention of valid arbitration agreements by plaintiffs. If plaintiffs could sue individual defendants, they could too easily avoid the arbitration agreements that they signed with corporate entities.”

Collie, 345 F. Supp. 2d at 562 (quoting *Davidson v. Becker*, 256 F. Supp. 2d 377, 384 (S.D.Md. 2003)). Thus, the mere fact that Defendant did not sign the SSAs in his individual capacity does not preclude him from enforcing the provisions of the arbitration clause contained in that document. Instead, as long as his alleged liability arises from his actions as an agent of the corporate signatory to the arbitration agreement, Defendant is entitled to enforce the arbitration clause contained in the SSA.

In this case, Plaintiffs allege that Defendant, as CEO, director, and shareholder of The Elevator Channel, misrepresented material facts about his qualifications to run the company in order to induce Plaintiffs’ investment. The actions upon which Plaintiffs’ claims are

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predicated were taken in his capacity as a representative of The Elevator Channel for the purpose of inducing Plaintiffs to invest in that corporation. Aside from the fact that Plaintiffs purchased their stock subject to the SSAs, certain of the defenses upon which Defendant relies rest on the provisions of the SSAs as well. Thus, we conclude, based on the allegations set out in the complaint, that Defendant was acting as an agent of The Elevator Channel at the time that the conduct upon which Plaintiffs' claims are predicated occurred, so that Plaintiffs' claims are inextricably entwined with the provisions of the SSAs, entitling Defendant to enforce the arbitration provision of that agreement.

Although Plaintiffs have advanced a number of different arguments in an attempt to persuade us to reach a contrary result, we do not find any of them persuasive. First, Plaintiffs characterize each SSA as a limited document that "primarily concerns the restriction of stock ownership" and contend that, because they "do not have a dispute with The Elevator Channel regarding stock transfer restrictions," their "grievances do not have a substantial relationship to the [SSAs]." However, as we have previously discussed, each SSA is a contract for the purchase of shares in The Elevator Channel that contains warnings and disclaimers concerning the risks of investment and numerous other purchase-related provisions. Contrary to Plaintiffs' contention that the SSA "does not address . . . personal representations made by Defendant," that document requires each signatory to explicitly represent that, in purchasing shares in The Elevator Channel, he or she did not rely upon any representations or promises from a source other than the official corporate documents, a requirement that is underscored by the SSAs' integration provision. As a result, we conclude that, contrary to Plaintiffs' argument, the SSAs bear a substantial relationship to the claims that Plaintiffs have asserted against Defendant in this proceeding.

Secondly, Plaintiffs argue that the "personal nature of these disputes" bars Defendant from enforcing the SSAs' arbitration clause. In essence, Plaintiffs contend that their claims rest upon "tortious acts Defendant committed in his personal capacity." The fundamental difficulty with this argument is that, while Plaintiffs allege that Defendant misrepresented facts about his personal background, they claim that he did so in his capacity as CEO and director in order to induce Plaintiffs to invest in The Elevator Channel.

The business and affairs of a corporation are ordinarily managed by its board of directors. [N.C. Gen. Stat. §] 55-24(a). In general,

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the directors establish corporate policies and supervise the carrying out of those policies through their duly elected and authorized officers. . . . This Court has frequently held that the president of a corporation by the very nature of his position is the head and general agent of the corporation, and accordingly he may act for the corporation in the business in which the corporation is engaged.

Burlington Indus., Inc. v. Foil, 284 N.C. 740, 758, 202 S.E.2d 591, 603 (1974) (citations omitted). “A corporation can act only through its agents, which include its corporate officers.” *Woodson v. Rowland*, 329 N.C. 330, 344, 407 S.E.2d 222, 231 (1991) (citing *Raper v. McCrory-McLellan Corp.*, 259 N.C. 199, 130 S.E.2d 281 (1963)). Defendant’s “position as chief executive officer of the corporation was such that his acts and knowledge would be the acts and knowledge of the corporation which can act only through its agents.” *Sledge Lumber Corp. v. Southern Builders Equip. Co.*, 257 N.C. 435, 439, 126 S.E.2d 97, 100 (1962). As a result, we conclude that Plaintiffs’ complaint alleges actions taken by Defendant in his capacity as an officer and director of The Elevator Channel. The fact that Plaintiffs have sought an individual recovery from Defendant and that Plaintiffs have not asserted that The Elevator Channel is vicariously liable for Defendant’s conduct is irrelevant, since the absence of such an assertion does not establish that he was not acting as a corporate agent at the time of his allegedly actionable conduct. For that reason, regardless of the manner in which Plaintiffs have couched their claims, Defendant is entitled to enforce the arbitration clause.

Finally, Plaintiffs attempt to distinguish this case from cases such as *Brown* and *Collie* on the basis that, in those cases, the plaintiff sued the principal as well as the agent. The reasons which have led this Court, and others, to allow agents to assert the benefits of arbitration clauses contained in their principal’s contract with the plaintiff exist regardless of whether the principal, in addition to the agent, is a named party to litigation. Plaintiffs do not explain the reason that the presence of the principal, in addition to the agent, should make any difference in our analysis, and we are unable to ascertain any reason for reaching that conclusion on our own. Recognizing such a difference would undercut North Carolina’s policy in favor of arbitration by allowing a plaintiff to determine whether a particular claim would be subject to arbitration by merely suing the agents of the signatory to the arbitration agreement instead of suing the signatory party. Thus, we conclude that the distinction upon which Plaintiffs rely is not a material one and that none of Plaintiffs’ arguments justify a decision to uphold the trial court’s order.

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III. Conclusion

Thus, for the reasons set forth above, we conclude that Plaintiffs' claims arise in connection with the SSA and that Defendant was acting in his capacity as a representative of The Elevator Channel when he allegedly made the misrepresentations upon which Plaintiffs' claims rest. Therefore, Defendant is entitled to enforce the arbitration clause in the SSAs, so that the trial court's order denying Defendant's motion to compel arbitration should be, and hereby is, reversed and this matter is remanded to the trial court for the entry of an order staying all further proceedings and requiring the parties to proceed to arbitration in accordance with the relevant provision of the SSAs.

REVERSED AND REMANDED.

Judges McGEE and GEER concur.

STATE OF NORTH CAROLINA v. PRESTON TEION RAWLS, DEFENDANT

No. COA09-1029

(Filed 19 October 2010)

1. Identification of Defendants— showup—motion to suppress pretrial identification—Eyewitness Identification Reform Act inapplicable

The trial court did not err in a felony breaking and entering case by denying defendant's motion to suppress the victim's pre-trial identification of defendant based on its conclusion that the Eyewitness Identification Reform Act (EIRA) under N.C.G.S. § 15A-284.52 does not apply to showup identifications. The EIRA details procedural requirements officers must follow for a photo lineup or live lineup where a group of people are displayed to the eyewitness. In contrast, a showup is the showing of suspects singly to witnesses for purposes of identification.

2. Identification of Defendants— showup—motion to suppress evidence—not unduly suggestive—no substantial likelihood of irreparable misidentification

The trial court did not err in a felony breaking and entering case by denying defendant's motion to suppress evidence arising out of a showup. The showup procedure was not unduly suggestive,

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and a totality of circumstances test revealed that there was no substantial likelihood of irreparable misidentification. The victim had a meaningful opportunity to view the suspect face-to-face only a table's length away and was asked to identify him 10 to 15 minutes later.

3. Appeal and Error— preservation of issues—failure to make timely objection

Although defendant contended the trial court erred in a felony breaking and entering case by denying defendant's objection to the victim's in-court identification of defendant, this argument was not preserved for appeal under N.C. R. App. P. 10(b)(1). The untimely objection was not made until well after the question and answer, and defendant failed to argue plain error on appeal.

Appeal by defendant from judgment entered 8 April 2009 by Judge James E. Hardin, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 14 January 2010.

Attorney General Roy Cooper, by Assistant Attorney General Chris Z. Sinha and Assistant Attorney General Kathleen N. Bolton, for the State.

Leslie C. Rawls for defendant-appellant.

GEER, Judge.

Defendant Preston Teion Rawls appeals from his conviction of one count of felony breaking and entering. Defendant primarily argues that the trial court, when denying his motion to suppress the victim's pretrial identification, erroneously concluded that N.C. Gen. Stat. § 15A-284.52 (2009), the Eyewitness Identification Reform Act ("the EIRA"), does not apply to showup identifications. We agree with the trial court. After reviewing the EIRA as a whole, considering our courts' prior decisions distinguishing showups from lineups, and noting the fact that defendant's argument would effectively eliminate the use of showups, we are unwilling to hold that the General Assembly intended the EIRA to apply to showups in the absence of any express indication of that intent.

Facts

At trial, the State's evidence tended to show the following. On the morning of 29 September 2008, Linette Rochelle Pickard Smith finished working the third shift at her job and returned to her house. She had just gone to bed when, at approximately 10:30 a.m., she heard a loud

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noise from another part of the house. She first checked her kitchen and, finding nothing out of the ordinary, then went to the living room.

There, she discovered that the back door had been kicked in and broken. She saw two men standing in the house and one man just outside the door. The man later identified as defendant was the closest one to Ms. Smith—he was about a table's length away. When Ms. Smith exclaimed, “[W]hat the hell,” she and defendant “looked right dead at each other” and made eye contact. The men then fled. From her back yard, Ms. Smith could see them running toward a path that led to a nearby apartment complex. Ms. Smith went back inside and called the police.

Officer S.J. Langholz, a canine officer with the Greensboro Police Department, arrived about five minutes later with his canine, Jake. While Officer Langholz took Jake out of his vehicle, Ms. Smith reported that the “two black males that came in her house were wearing white tee shirts and khaki pants; the third one was wearing dark pants, possibly blue jeans and an unknown shirt.” She also informed him that they had gone down the path toward the apartments.

Detective Eric Gray Miller was also in the area when he heard a radio broadcast with a partial description of the suspects. He started to drive toward Ms. Smith's house, but Officer Langholz advised him to go ahead to the apartment complex. As Detective Miller drove through the complex, he observed three men, in a breezeway, who fit the description he had heard on the radio. One of the men, defendant, was wearing light-colored warm-up pants and a hooded sweatshirt, another was wearing a white tee shirt and khakis, and the third man was wearing a white tee shirt and blue jeans. Detective Miller radioed for assistance. As he pulled up, the man in the white tee shirt and khakis began to walk away, but Detective Miller got out of the car and called him back over.

Meanwhile, Jake had begun to track from Ms. Smith's backyard, leading Officer Langholz down the path to the apartment complex. Jake tracked up to the second or third building until they came upon a blue duffel bag that Jake picked up and shook. Jake then dropped the bag and walked around the corner of the building into a breezeway and began barking. This breezeway was where Detective Miller and other officers were waiting with the three subjects.

Officer Miranda Key Lone was one of the officers who went to the apartment complex to assist Detective Miller. Once she arrived, she was directed to Ms. Smith's house to see if Ms. Smith would be willing to do a showup identification of the suspects. Officer Lone told Ms. Smith,

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“[T]hey think they found the guy[,]” and Ms. Smith agreed to the showup. Officer Lone then took Ms. Smith and her husband in the patrol car to the apartment complex, about a 45-second drive.

From the car, Ms. Smith was unable to get a good view of the three detained individuals, so she got out of the car and walked up the stairs to where they were sitting. Recognizing the men’s clothing and defendant’s face, she identified all three as the men who had been at her house. She “pointed them out” individually, saying “that was him, the first one; and this is the second one, and that’s the third one.” Ms. Smith indicated that the first two men, including defendant, were the ones inside the living room, but she was unsure if the third man had actually entered the house. When Detective Miller asked Ms. Smith if she was sure about the identifications, she replied that “she was positive, and that she could not forget their faces.”

Defendant was subsequently indicted on the charge of breaking and entering.¹ On 6 April 2009, defendant filed a motion to suppress any evidence related to the showup, as well as any in-court identification of defendant, on the grounds that the showup was impermissibly suggestive and violated the EIRA. Defendant also contended that “any in-court identification is, in and of itself, a suggestive identification procedure.” The trial court ruled that the EIRA does not apply to showups and denied defendant’s motion to suppress.

The jury found defendant guilty of breaking and entering, and the trial court sentenced him to a presumptive-range term of eight to 10 months imprisonment. The court suspended the sentence and placed defendant on supervised probation for 36 months. Defendant timely appealed to this Court.

I

[1] Defendant first argues that the trial court erred in ruling that the EIRA does not apply to showups. The purpose of the EIRA “is to help solve crime, convict the guilty, and exonerate the innocent in criminal proceedings by improving procedures for eyewitness identification of suspects.” N.C. Gen. Stat. § 15A-284.51 (2009). The EIRA details several procedural requirements that law enforcement officers must follow when conducting a “lineup,” which the EIRA defines as a “photo lineup or live lineup.” N.C. Gen. Stat. § 15A-284.52(a)(4).

1. Although it appears from the transcript of the proceedings that defendant was also indicted for attempted larceny pursuant to breaking and entering, injury to real property, and felony conspiracy, those indictments are not included in the record on appeal.

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As our Supreme Court has emphasized, when construing a statute, “our primary task is to ensure that the purpose of the legislature, the legislative intent, is accomplished.” *Elec. Supply Co. of Durham, Inc. v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991). In performing this function, “[l]egislative purpose is first ascertained from the plain words of the statute.” *Id.* See also *O & M Indus. v. Smith Eng’g Co.*, 360 N.C. 263, 267-68, 624 S.E.2d 345, 348 (2006) (“The first consideration in determining legislative intent is the words chosen by the legislature.”). When the words are unambiguous, “they are to be given their plain and ordinary meanings.” *Id.* at 268, 624 S.E.2d at 348. When, however, the words are ambiguous, “judicial construction must be used to ascertain the legislative will.” *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136-37 (1990).

The question presented by this appeal is whether the “lineup” referenced in the EIRA encompasses a “showup.” Since there is no dispute that a showup is not a “photo lineup,” the question is whether a showup falls within the definition of a “live lineup.” “If a statute ‘contains a definition of a word used therein, that definition controls,’ but nothing else appearing, ‘words must be given their common and ordinary meaning[.]’” *Knight Publ’g Co. v. Charlotte-Mecklenburg Hosp. Auth.*, 172 N.C. App. 486, 492, 616 S.E.2d 602, 607 (quoting *In re Clayton-Marcus Co.*, 286 N.C. 215, 219, 210 S.E.2d 199, 203 (1974)), *disc. review denied*, 360 N.C. 176, 626 S.E.2d 299 (2005). Further, “[w]ords and phrases of a statute may not be interpreted out of context, but individual expressions must be construed as a part of the composite whole and must be accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit.” *In re Expungement of Spencer*, 140 N.C. App. 776, 779, 538 S.E.2d 236, 238 (2000) (quoting *In re Hardy*, 294 N.C. 90, 95-96, 240 S.E.2d 367, 371-72 (1978)).

The EIRA defines a “live lineup” as “[a] procedure in which a group of people is displayed to an eyewitness for the purpose of determining if the eyewitness is able to identify the perpetrator of a crime.” N.C. Gen. Stat. § 15A-284.52(a)(6). A showup, by contrast, is “the practice of showing suspects singly to witnesses for purposes of identification.” *State v. Turner*, 305 N.C. 356, 364, 289 S.E.2d 368, 373 (1982) (defining “showup”). There is no dispute that the procedure at issue in this case was a showup—Ms. Smith was shown three men and asked if they were the three men at her house. Although defendant acknowledges that not all showups would fit within the definition of a “live lineup,” defendant

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argues that what occurred in this case fits within the definition of a live lineup because Ms. Smith was shown a group of people.

The plain language of the definition leaves open the question whether the “group” is supposed to include only one perpetrator or whether the reference to a “group” encompasses the situation here when multiple suspects are present in the group observed by the witness in a context other than a formal lineup. Reading the statute as a whole, however, “live lineup” cannot reasonably be construed to encompass a showup such as the one that occurred here.

The EIRA provides that a single live lineup may contain no more than one suspect, and must also contain at least five “fillers”—people who are included in the lineup but are “not suspected of an offense.” N.C. Gen. Stat. § 15A-284.52(a)(2),–(b)(5)(c), –(b)(10). “The lineup shall be composed so that the fillers generally resemble the eyewitness’s description of the perpetrator, while ensuring that the suspect does not unduly stand out from the fillers.” N.C. Gen. Stat. § 15A-284.52(b)(5). Additionally, “[a]ll fillers selected shall resemble, as much as practicable, the eyewitness’s description of the perpetrator in significant features, including any unique or unusual features.” N.C. Gen. Stat. § 15A-284.52(b)(5)(a).

These provisions demonstrate that the live lineup’s “group” is not intended to include a group of suspects located by officers while investigating a crime, but rather is a group of individuals brought together for the purpose of the lineup. *See* Sarah Anne Mourer, “Reforming Eyewitness Identification Procedures Under the Fourth Amendment,” 3 Duke J. Const. L. & Pub. Pol’y 49, 90 n.137 (2008) (“A show-up identification is characterized by the witness being presented with only one suspect for possible identification; no fillers are included.”).

The EIRA further provides that a live lineup must be “conducted by an independent administrator,” who is defined as someone “not participating in the investigation of the criminal offense and is unaware of which person in the lineup is the suspect.” N.C. Gen. Stat. § 15A-284.52(a)(3), –(b)(1). Before a lineup begins, the eyewitness must be instructed that, *inter alia*, “[t]he perpetrator might or might not be presented in the lineup,” and “[t]he lineup administrator does not know the suspect’s identity.” N.C. Gen. Stat. § 15A-284.52(b)(3)(a), –(b)(3)(b).

It is difficult to reconcile the concept of a showup with the requirement of an administrator who is not participating in the investigation of the crime. Showups are typically “defined as a procedure where the police take a witness, shortly after the commission of an observed

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crime, to where the police are detaining the suspect, in order to give them an opportunity to make an identification.” *Smith v. State*, 880 So.2d 730, 739 n.2 (Fla. App. 2004) (internal quotation marks omitted). Indeed, our Supreme Court has observed that “[s]howups are an efficient technique for identifying a perpetrator when the [crime] is still fresh.” *In re Stallings*, 318 N.C. 565, 569, 350 S.E.2d 327, 329 (1986).

Viewing the EIRA as a whole, we agree with the trial court that the EIRA does not apply to showups because the procedure of a live lineup is inherently inconsistent with the definition of a showup. Most importantly, there are no fillers in a showup—only suspects. In addition, the person setting up a showup would typically not be an independent administrator but would likely either have spoken to the witness or have been involved in detaining the suspect or suspects.

Our Supreme Court has also expressly distinguished between showups and lineups. *See, e.g., State v. Richardson*, 328 N.C. 505, 510, 402 S.E.2d 401, 404 (1991) (referring to showup as “ ‘practice of showing suspects singly to persons for the purpose of identification, and *not as part of a lineup*’ ” (emphasis added) (quoting *State v. Oliver*, 302 N.C. 28, 44, 274 S.E.2d 183, 194 (1981))); *Stallings*, 318 N.C. at 570, 350 S.E.2d at 329 (explaining that for juvenile defendant, lineup is “method[] that intrude[s] significantly upon the juvenile’s privacy,” but “showup, *by contrast*, is a much less restrictive means of determining, at the earliest stages of the investigation process, whether a suspect is indeed the perpetrator of a crime” (emphasis added)).

Black’s Law Dictionary differentiates the terms as well, defining a showup as a “pretrial identification procedure in which a suspect is confronted with a witness to or the victim of a crime” and further explaining that “[u]nlike a lineup, a showup is a one-on-one confrontation. Cf. LINEUP.” *Black’s Law Dictionary* 1506 (9th ed. 2009) (emphasis added). Even defendant acknowledges that “[t]raditionally, show-ups, like the one in this case, have been distinguished from lineups.”

It is well established that the legislature is “ ‘presume[d] [to have] acted with full knowledge of prior and existing law and its construction by the courts.’ ” *State v. Anthony*, 351 N.C. 611, 618, 528 S.E.2d 321, 324 (2000) (quoting *State ex rel. Cobey v. Simpson*, 333 N.C. 81, 90, 423 S.E.2d 759, 763 (1992)). Given that the legislature is presumed to be fully aware of our courts’ prior distinctions between lineups and showups and given that, in the face of this precedent, the legislature did not reference showups in the EIRA, it is unlikely that the legislature intended the word “lineup” to encompass a “showup.”

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Moreover, if we were to accept defendant's argument that the EIRA applies to showups, showups would effectively be eliminated. Our Supreme Court has previously concluded that a statute should not be construed in a way that would eliminate showups in the absence of an express statement by the legislature of its intent to do so. In *Stallings*, 318 N.C. at 568, 350 S.E.2d at 328, the Supreme Court considered a similar argument involving a statute in the Juvenile Code that required investigators dealing with juvenile suspects to obtain a court order before conducting certain "nontestimonial identification" procedures, including lineups. Although the statute, like the EIRA, did not mention showups, the juvenile argued that the reference to "lineups" should be construed to include "showups," thus making a court order a prerequisite for a showup.

The *Stallings* Court noted, in its analysis, that "[t]he value of the showup as an investigatory technique has been recognized in many jurisdictions" and that our Supreme Court had "on numerous occasions, sanctioned the use of showups." *Id.* at 569, 350 S.E.2d at 329. It further pointed out that "[t]he showup . . . is a much less restrictive means of determining, at the earliest stages of the investigation process, whether a suspect is indeed the perpetrator of a crime[.]" allowing an innocent person to be "released with little delay and with minimal involvement with the criminal justice system." *Id.* at 570, 350 S.E.2d at 329.

It then concluded that making showups subject to the statute, although not specifically referenced in the statute, would not be consistent with the legislature's intent:

If we were to adopt the reasoning and argument advanced by the juvenile here, it would mean that if an officer reached a crime scene immediately upon the happening of a break-in and found the juvenile perpetrator huddled under the porch of the house he had just fled, the officer could not ask the eyewitness homeowner if the juvenile was the one who the homeowner had just seen inside the house. Such a result would be absurd and could not have been intended by our legislature in enacting N.C.G.S. § 7A-596. The juvenile's reading of the statute would effectively eliminate the showup from the repertoire of investigative techniques available to law enforcement officers. We hold that the legislature did not intend this result.

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Id. at 570-71, 350 S.E.2d at 329-30.

We hold that the reasoning in *Stallings* controls in this case. We must presume that the General Assembly was familiar with *Stallings* when it enacted the EIRA—accordingly, it knew that it needed to specifically reference showups in the EIRA if it intended them to be covered by the EIRA. Yet, it did not do so. Given (1) that the provisions of the statute are inconsistent with the methodology of a showup, (2) that application of the EIRA to showups would effectively eliminate showups as an investigative technique, and (3) that showups, although sometimes troubling, may also, in some circumstances, lead to elimination of innocent individuals from investigation at an early stage, we are unwilling to conclude that the General Assembly intended that showups be subject to the requirements of the EIRA. The trial court, therefore, did not err in concluding that the EIRA did not apply to the showup in this case.

II

[2] Alternatively, defendant contends that the trial court erred in denying his motion to suppress evidence arising out of the showup because the showup procedure was impermissibly suggestive. Our courts apply “a two-step process for determining whether an identification procedure was so suggestive as to create a substantial likelihood of irreparable misidentification.” *State v. Marsh*, 187 N.C. App. 235, 239, 652 S.E.2d 744, 746 (2007), *overruled on other grounds by State v. Tanner*, 364 N.C. 229, 695 S.E.2d 97 (2010). “First, the Court must determine whether the identification procedures were impermissibly suggestive. Second, if the procedures were impermissibly suggestive, the Court must then determine whether the procedures created a substantial likelihood of irreparable misidentification.” *Id.* (quoting *State v. Fowler*, 353 N.C. 599, 617, 548 S.E.2d 684, 698 (2001), *cert. denied*, 535 U.S. 939, 152 L. Ed. 2d 230, 122 S. Ct. 1322 (2002)). Even though they may be “suggestive and unnecessary,” showups “are not *per se* violative of a defendant’s due process rights.” *Turner*, 305 N.C. at 364, 289 S.E.2d at 373.

Here, before Ms. Smith was taken to the apartments for the showup, Officer Lone explained to her what a showup is and told her, “[T]hey think they found the guy.” By the time Ms. Smith arrived at the apartments and saw defendant, he was detained and sitting down, and “[t]here were several officers around.”

This showup procedure is analogous to the one reviewed in *Richardson*, 328 N.C. at 511, 402 S.E.2d at 405. In *Richardson*, three

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witnesses identified the defendant as the man they had seen at their workplace a few hours earlier. *Id.* During the identification, the defendant “was sitting alone or with uniformed personnel in the security office at the hospital” and “investigating officers told [two of] the witnesses defendant was a suspect” before those witnesses saw him. *Id.* The Supreme Court determined that “[t]he identification procedures the officers chose, coupled with their statements to two of the three witnesses that ‘they had a suspect,’ were unduly suggestive.” *Id.* See also *Oliver*, 302 N.C. at 45, 274 S.E.2d at 194 (holding showup procedure unduly suggestive when coupled with statement by officers to witness that he would have chance, at police station, to see again man who attacked his grandfather).

Richardson and *Oliver* are materially indistinguishable from this case. We, therefore, conclude that the showup procedure used here was unduly suggestive. Nevertheless, even though the showup was impermissibly suggestive, we find that there was no substantial likelihood of irreparable misidentification.

When evaluating whether such a likelihood exists, courts apply a totality of the circumstances test. *State v. Smith*, 134 N.C. App. 123, 127, 516 S.E.2d 902, 905-06 (1999). “For both in-court and out-of-court identifications, there are five factors to consider in determining whether an identification procedure is so inherently unreliable that the evidence must be excluded from trial: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness’s degree of attention; (3) the accuracy of the witness’s prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation.” *State v. Washington*, 192 N.C. App. 277, 296-97, 665 S.E.2d 799, 811 (2008). “‘Against these factors is to be weighed the corrupting effect of the suggestive identification itself.’” *Turner*, 305 N.C. at 365, 289 S.E.2d at 374 (quoting *Manson v. Brathwaite*, 432 U.S. 98, 114, 53 L. Ed. 2d 140, 154, 97 S. Ct. 2243, 2253 (1977)).

Applying these factors, while Ms. Smith only viewed the suspects for a short time, she looked “dead at” the suspect she later identified as defendant and made eye contact with him from only a table’s length away. It was approximately 10:30 in the morning, and nothing was obstructing her view. The showup occurred only 15 minutes later, and Ms. Smith was “positive” about the identifications of the three suspects, as “she could not forget their faces.”

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These facts when weighed against the suggestiveness of the showup are sufficient to support the determination that there was no substantial likelihood of irreparable misidentification. See *Richardson*, 328 N.C. at 511, 402 S.E.2d at 405 (finding no substantial likelihood of misidentification when witness saw suspect “for about three to four seconds after her suspicions were aroused,” “[h]er description matched that of other witnesses,” showup occurred only about 45 minutes after witness originally saw suspect, and “she was unequivocal in her identification”); *State v. Cain*, 79 N.C. App. 35, 45, 338 S.E.2d 898, 904 (finding no substantial likelihood of misidentification when witness observed suspect “for 5-10 seconds from a distance of 15-20 feet” and later “identified the defendant as the man he saw, having no doubt in his mind”), *disc. review denied*, 316 N.C. 380, 342 S.E.2d 899 (1986).

Defendant points to the fact that his clothing did not fit the description of the intruders given by Ms. Smith. When defendant was detained, he was wearing a hooded sweatshirt and light-colored jogging pants rather than the khakis and white tee shirt Ms. Smith had reported. Similarly, in *Richardson*, 328 N.C. at 511-12, 402 S.E.2d at 405, one of the witnesses “described . . . what defendant had been wearing when he saw him earlier,” but the defendant “was clothed differently by [the] time” of the identification. Nonetheless, the Court held that considering the totality of the circumstances, particularly that the witness was “certain in his identification,” the trial court did not err in admitting the out-of-court identification. *Id.* at 512, 402 S.E.2d at 405.

Here, although the discrepancy between Ms. Smith’s description and defendant’s attire detracts from the reliability of the identification, other factors—including her certainty, her ability to view him directly from a short distance, and the short window between the crime and the identification—substantially bolster it. In addition, one of the men with defendant, the second man identified as being in the house, *was* wearing a white tee shirt and khakis as described by Ms. Smith.

Defendant’s reliance on *State v. Miller*, 270 N.C. 726, 154 S.E.2d 902 (1967), is misplaced. As the Supreme Court has explained, “*Miller* stands for the proposition that while the question of whether the identification testimony of the prosecuting witness has any probative value is for the jury to decide, the rule has no application where the *only* evidence which tends to identify a defendant as the perpetrator of the offense is inherently incredible because of undisputed facts clearly established by the state’s evidence.” *State v. Royal*, 300 N.C. 515, 524, 268 S.E.2d 517, 524 (1980) (emphasis added).

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Miller, on the other hand, “has no application . . . where there is a reasonable opportunity of observation which is sufficient to permit a subsequent identification.” *Royal*, 300 N.C. at 525, 268 S.E.2d at 524. In *Miller*, the witness observed a man, someone he had never seen before, in the evening from a distance of no less than 286 feet. 270 N.C. at 732, 154 S.E.2d at 905. The man was running except for one time when he turned around to “peep” at the witness. *Id.* The description that the witness gave the police was of a man substantially taller than the defendant; otherwise, the witness could only say that the man was dressed in dark clothing. *Id.* Six hours later, the witness identified the defendant in a lineup “so arranged that the identification of [the defendant] with the man seen earlier would naturally be suggested to the witness.” *Id.*

Although the Court held in *Miller* that “upon the physical conditions shown [there] by the State’s evidence,” the identification was not sufficient to send the case to the jury, the Court emphasized that “[w]here there is a reasonable possibility of observation sufficient to permit subsequent identification, the credibility of the witness’ identification of the defendant is for the jury” *Id.*, 154 S.E.2d at 906. Here, in contrast to *Miller*, Ms. Smith had a meaningful, if brief, opportunity to view the suspect face to face only a table’s length away and was asked to identify him a mere 10 to 15 minutes later. We hold that under the circumstances in this case, Ms. Smith had the opportunity for observation required by *Miller* and, therefore, *Miller* did not require the exclusion of her identification.

In sum, weighing the *Washington* factors against the suggestiveness of the showup procedure, we conclude that there was not a substantial likelihood of irreparable misidentification in this case. The trial court, therefore, did not err in denying defendant’s motion to suppress.

III

[3] Lastly, defendant argues that the court erred in overruling his objection to Ms. Smith’s in-court identification of defendant. Defendant failed, however, to timely object to the in-court identification.

At trial, during Ms. Smith’s direct examination, she identified defendant as the person who had broken into her house:

A. . . . So I went to my living room area. That’s when I seen the defendant. I don’t know if I can say the name, but another person behind him, and then another person behind him. We looked right dead at each other.

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Q. When you say “we looked at each other,” who are you referring to?

A. Me and the defendant.

Q. What is the defendant’s name?

A. Preston.

Q. When you refer to “Preston,” can you point to him in the courtroom, please.

A. Yes, he has on an orange shirt (indicating).

Defendant made no objection to this identification at the time.

Later, when the examination addressed the showup, defendant finally objected to Ms. Smith’s in-court identification. The trial court, in overruling the objection, pointed out that Ms. Smith “already identified the defendant in court as having been in her house, and there was no objection.” Defendant acknowledged, “I understand that, Your Honor.”

Rule 10 of the Rules of Appellate Procedure “provides that ‘[i]n order to preserve a question for appellate review, a party must have presented to the trial court a *timely* request, objection or motion, stating the specific grounds for the ruling the party desired the court to make.’” *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 195, 657 S.E.2d 361, 363 (2008) (emphasis added) (quoting N.C.R. App. P. 10(b)(1)). Defendant’s objection, not made until well after the question and answer, was not timely and, therefore, was insufficient to preserve the issue for appeal.

Defendant does not argue plain error on appeal, and, therefore, whether admission of the identification amounted to plain error is not before us. *See State v. Bell*, 359 N.C. 1, 27, 603 S.E.2d 93, 111 (2004) (“Defendant failed to specifically assert plain error. He therefore failed to properly preserve this issue for appellate review.”), *cert. denied*, 544 U.S. 1052, 161 L. Ed. 2d 1094, 125 S. Ct. 2299 (2005); *State v. Williams*, 153 N.C. App. 192, 195-96, 568 S.E.2d 890, 892-93 (holding issue not reviewable by Court when defendant failed to preserve error at trial and did not specifically and distinctly assert plain error in appellate brief), *disc. review improvidently allowed*, 357 N.C. 45, 577 S.E.2d 618 (2003).

No error.

Judges CALABRIA and STEPHENS concur.

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MARY S. JOHNSTON, EMPLOYEE, PLAINTIFF-APPELLANT v. DUKE UNIVERSITY MEDICAL CENTER, AND ITS SUBSIDIARY DUKE HEALTH COMMUNITY CARE (SELF-INSURED) EMPLOYER, DEFENDANT-APPELLEES

No. COA09-1582

(Filed 19 October 2010)

Workers' Compensation—timeliness of claim—interrelated injuries and conditions

The Industrial Commission correctly determined that plaintiff failed to file her workers' compensation claim in a timely manner and that her claims should be dismissed. Plaintiff, a nurse, began experiencing foot pain in 1992 and filed her first workers' compensation claim in 2001, which she conceded was time-barred; she filed another claim in 2007 for tarsal tunnel syndrome and Achilles tendinopathy; and she contended that these were new disabilities because the prior episodes had resolved. In instances in which an employee claims to have multiple interrelated and continuous conditions affecting the same part of the body, the employee has only one workers' compensation claim rather than several.

Appeal by plaintiff from an Opinion and Award entered by the North Carolina Industrial Commission on 7 August 2009. Heard in the Court of Appeals 13 May 2010.

Lennon & Camak, P.L.L.C., by George W. Lennon and Michael Bertics, for plaintiff-appellant.

Cranfill Sumner & Hartzog LLP, by Amy L. Pfeiffer and Ashley Baker White, for defendant-appellees.

ERVIN, Judge.

Plaintiff Mary S. Johnston appeals from an Opinion and Award entered by Commissioner Laura Kranifeld Mavretic on behalf of the Industrial Commission which denied and dismissed Plaintiff's claim for workers' compensation benefits because the Commission lacked jurisdiction over that claim. After careful consideration of Plaintiff's challenges to the Commission's order in light of the record and the applicable law, we conclude that the Commission's decision should be affirmed.

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I. Factual Background

Plaintiff is a Licensed Registered Nurse with a master's degree in nursing education. Plaintiff has worked as a nurse since 1982, and began her employment in the emergency room at Duke University Medical Center in February 1992. Plaintiff's work in the emergency room was performed in 12 hour shifts, with 95% of a nurse's time being spent walking and standing on hard floors.

Plaintiff began experiencing foot pain as early as 1992. As a result, Plaintiff's primary care physician, Dr. Holcombe, referred Plaintiff to Dr. Rhonda S. Cohen, a podiatrist. On 7 August 1992, Dr. Cohen diagnosed a lesion on Plaintiff's foot as prokeratosis.

Plaintiff returned to Dr. Cohen in February 1996, at which time she complained of "pain when walking on [her] left foot." On 28 June 1999, Plaintiff informed the Duke Acute Care Clinic that she was suffering from left arch pain and was diagnosed with plantar fasciitis. On 23 August 1999, Plaintiff reported ongoing pain in the "arch area" of her foot. Plaintiff was treated with orthotics and injections through 1 May 2000. After her foot pain failed to subside, Plaintiff requested that Dr. Holcombe refer her to an orthopedic surgeon, which resulted in her treatment by Dr. Samuel David Stanley.

Dr. Stanley initially saw Plaintiff in July 2000. According to Plaintiff, Dr. Stanley was of the opinion that her injury was work-related from "the first time he saw me." At that time, Plaintiff reported a history of "about a year's worth" of left heel pain stemming from plantar fasciitis. Dr. Stanley diagnosed Plaintiff with recalcitrant plantar fasciitis and treated her with "physical therapy, orthotics, nonsteroidal inflammatory medications, night splints, [and] cast immobilization." While undergoing treatment for recalcitrant plantar fasciitis, Plaintiff developed Achilles tendinitis and received extensive treatment for this condition as well.

After more conservative treatment failed to bring relief, Plaintiff underwent a surgical debridement of the tendon in September 2001, followed by several months of post-operative treatment. Although Dr. Stanley advised Plaintiff against returning to work, she went back to work in the emergency room on 4 December 2001. Dr. Stanley provided her with medical orders explaining the necessity for Plaintiff to have modified duties, including reduced daily working hours.

On 5 January 2001, Plaintiff notified her employer of her "chronic plantar fasciitis" by submitting a Form 19. By means of a letter dated 26 January 2001, Plaintiff was informed that Duke University Medical

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Center had denied her claim for workers' compensation benefits and that she could contact the Commission in the event that she had any questions. Plaintiff also received a Form 61 dated 19 January 2001 notifying her that her employer had denied her claim for workers' compensation benefits and explaining that she had the option of filing a Form 33 with the Commission in the event that she disagreed with Duke's decision to deny her claim.¹ After Plaintiff failed to take any further action for the purpose of prosecuting her claim for workers' compensation benefits, Duke sent Plaintiff a letter dated 17 September 2001 for the purpose of notifying her that her claim had been closed.

Plaintiff was transferred from the emergency room to a patient resource manager position in March 2002. Although Plaintiff's patient manager position required less walking than had been necessary in connection with her job as an emergency room nurse, she was still on her feet approximately 50% of the time in her new position. In addition, Plaintiff continued to have bilateral foot and ankle symptoms and to miss work on an intermittent basis following her transfer to the patient manager position.

In January 2004, Plaintiff complained of a "band-like pain extending around the ankle" and bilateral numbness. Given that he suspected tarsal tunnel syndrome or a neuropathy, Dr. Stanley ordered that nerve conduction studies be performed. At the time that Plaintiff returned to his office on 10 February 2004, Dr. Stanley reviewed the results of the nerve conduction studies, which suggested that Plaintiff had tarsal tunnel syndrome, and an MRI of Plaintiff's left foot, which showed posterior tibial tendinopathy and a possible ganglion cyst with no evidence of plantar fasciitis. As a result, Dr. Stanley referred Plaintiff to Dr. James A. Nunley, II, the Chief of Duke's Division of Orthopedic Surgery and the Chief of Duke's Foot and Ankle Service.

Dr. Nunley saw Plaintiff on 28 April 2004. At that time, Dr. Nunley concluded that Plaintiff suffered from tarsal tunnel syndrome, posterial tibial tendon disease, Baxter's nerve compression, and a ganglion cyst. Moreover, based on the recent MRI, Dr. Nunley concluded that Plaintiff did not have plantar fasciitis. Although he recommended that Plaintiff consider further surgery, Plaintiff did not receive further treatment from Dr. Nunley due to a personality conflict.

1. Although Duke did not provide her with a copy of a Form 18 at the time that it rejected her contention that she was entitled to workers' compensation benefits, the Industrial Commission rules in effect at that time, unlike the rules in effect now, did not require the employer to do so.

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Plaintiff was discharged from her employment at Duke in March 2004 because she needed to care for a sick aunt in Houston, Texas, and lacked sufficient sick or vacation time to cover her absence. Upon returning to North Carolina, Plaintiff began working as an admissions nurse for hospice patients at Duke University Community Care on 1 June 2004. Although Plaintiff was not on her feet as much in the hospice nurse position as she had been in her previous positions, her duties as a hospice nurse still required her to spend substantial time standing and walking on hard surfaces.

Plaintiff worked as a hospice nurse for approximately one year without receiving additional medical treatment. However, her symptoms worsened in 2005, causing her to return to Dr. Stanley. In the summer of 2005, Dr. Stanley referred Plaintiff to Dr. Mark Easley, an orthopedic surgeon at Duke Health Center, for the purpose of obtaining a second opinion. At that time, Dr. Easley concluded that Plaintiff had tarsal tunnel syndrome. In addition, he noted the presence of Achilles tendinopathy. At his initial consultation with Plaintiff, Dr. Easley recommended conservative treatment, such as a heel lift and orthotics, but also noted the existence of a surgical option. On 10 October 2005, Dr. Easley performed various surgical procedures on Plaintiff, including a right Achilles tendon debridement, a right side tarsal tunnel release, and a calcaneal exostectomy repair of the Achilles tendon.

In Dr. Stanley's opinion, Plaintiff was temporarily disabled during various periods of time following the 2001 surgery. According to Dr. Stanley, tarsal tunnel syndrome is distinct from plantar fasciitis and Achilles tendinopathy "in that you can have it and not have the other [two]." However, Dr. Stanley also testified that plantar fasciitis and tarsal tunnel syndrome are related conditions, so that, "if you have plantar fasciitis, the inflammation can increase pressure in the tarsal tunnel and can lead to tarsal tunnel syndrome," making it not uncommon to see the two together. Similarly, Dr. Easley opined that Plaintiff's plantar fasciitis and tarsal tunnel syndrome "overlap" and "go hand in hand." Although Dr. Stanley signed a "Repetitive Motion Medical Questionnaire" which recited multiple diagnoses including tendinitis, tenosynovitis, and synovitis, Dr. Stanley described each of these diagnoses as subparts of the same overall condition. Plaintiff stopped working for Duke Health Community Care on 27 July 2005. Plaintiff has been unemployed and receiving both long and short-term disability benefits from Duke since at least 1 November 2005.

On 10 April 2007, Plaintiff filed a Form 18 with the Commission asserting her right to receive workers' compensation benefits from

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Duke. Plaintiff alleged that she had become disabled due to “bilateral legs” on 1 August 2005. In a Form 33 relating to the denial of the claim asserted in the Form 19 that Plaintiff filed on 23 April 2007, Plaintiff alleged that she had sustained a “bilateral legs/psychiatric” injury on 5 January 2001.

Plaintiff’s claims were consolidated for hearing and heard before Deputy Commissioner Kim Ledford on 27 February 2008. On 17 February 2009, Deputy Commissioner Ledford issued an Opinion and Award finding that Plaintiff had developed multiple occupational diseases of her feet and ankles, but that Plaintiff’s workers’ compensation claims based upon those conditions were time-barred. Both parties noted appeals to the Commission from Deputy Commissioner Ledford’s order.

On 7 August 2009, the Full Commission filed an Opinion and Award in which it affirmed Deputy Commissioner Ledford’s decision with modifications. In its order, the Commission agreed with Deputy Commissioner Ledford that Plaintiff’s claims were time-barred. Plaintiff noted an appeal to this Court from the Commission’s order.

II. Legal Analysis

A. Standard of Review

Generally speaking, “[t]he findings of fact by the Industrial Commission are conclusive on appeal if supported by any competent evidence.” *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (quoting *Gallimore v. Marilyn’s Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977)). However, “the Commission’s findings of jurisdictional fact are *not* conclusive on appeal, even if supported by competent evidence. The reviewing court has the right, and the duty, to make its own independent findings of such jurisdictional facts from its consideration of all the evidence in the record.” *Washington v. Traffic Markings, Inc.*, 182 N.C. App. 691, 696, 643 S.E.2d 44, 47 (2007) (quoting *Perkins v. Arkansas Trucking Servs., Inc.*, 351 N.C. 634, 637, 528 S.E.2d 902, 903-04 (2000)). The time limitations set out in N.C. Gen. Stat. § 97-58(c) are jurisdictional in nature. *Underwood v. Cone Mills Corp.*, 78 N.C. App. 155, 156-57, 336 S.E.2d 634, 636 (1985), *disc. review denied*, 316 N.C. 202, 341 S.E.2d 583 (1986); *Clary v. A.M. Smyre Mfg. Co.*, 61 N.C. App. 254, 257, 300 S.E.2d 704, 706 (1983) (stating that “the two-year time limit for filing claims under . . . [N.C. Gen. Stat. § 97-58(c)] is a condition precedent with which claimants must comply in order to confer jurisdiction on the Industrial Commission to hear the claim”) (quoting *Poythress v. J.P. Stevens & Co.*, 54 N.C. App. 376, 382, 283 S.E.2d 573, 577 (1981), *disc. review denied*, 305 N.C. 153, 289

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S.E.2d 380 (1982)). Thus, the dates upon which Plaintiff's claims accrued are matters of jurisdictional fact. "The Commission's conclusions of law . . . are reviewable *de novo*." *Snead v. Carolina Pre-Cast Concrete*, 129 N.C. App. 331, 335, 499 S.E.2d 470, 472, *cert. denied*, 348 N.C. 501, 510 S.E.2d 656 (1998) (citing *Grantham v. R.G. Barry Corp.*, 127 N.C. App. 529, 491 S.E.2d 678 (1997), *disc. review denied*, 347 N.C. 671, 500 S.E.2d 86 (1998)).

The Workers' Compensation Act is to be "liberally construed so that the benefits thereof should not be denied upon technical, narrow and strict interpretation. The primary consideration is compensation for injured employees." *Hinson v. Creech*, 286 N.C.156, 161, 209 S.E.2d 471, 475 (1974) (quoting *Barbour v. State Hospital*, 213 N.C. 515, 517, 196 S.E. 812, 814 (1938); *see also Stevenson v. City of Durham*, 281 N.C. 300, 303, 188 S.E.2d 281, 283 (1972); *Hollman v. City of Raleigh*, 273 N.C. 240, 252, 159 S.E.2d 874, 882 (1968). "The evidence tending to support plaintiff's claim is to be viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence." *Adams*, 349 N.C. at 681, 509 S.E.2d at 414 (citing *Doggett v. South Atl. Warehouse Co.*, 212 N.C. 599, 194 S.E. 111 (1937)).

B. Analysis of Commission's Decision

On appeal, Plaintiff challenges the Commission's determination that her workers' compensation claim was not filed in a timely manner as required by N.C. Gen. Stat. § 97-58 (2009). We do not find Plaintiff's argument persuasive.

N.C. Gen. Stat. § 97-58 provides, in pertinent part, that:

(b) The report and notice to the employer as required by [N.C. Gen. Stat. §] 97-22 shall apply in all cases of occupational disease except in case[s] of asbestosis, silicosis, or lead poisoning. The time of notice of an occupational disease shall run from the date that the employee has been advised by competent medical authority that he has same.

(c) The right to compensation . . . shall be barred unless a claim be filed with the Industrial Commission within two years after death, disability, or disablement as the case may be.

In *Taylor v. Stevens & Co.*, 300 N.C. 94, 101-02, 265 S.E.2d 144, 148 (1980), the Supreme Court held that these two statutory subsections must be read in *pari materia* and that, when these provisions are construed in that manner:

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The two year period within which claims for benefits for an occupational disease must be filed begins running when an employee has suffered injury from an occupational disease which renders the employee incapable of earning, at any job, the wages the employee was receiving at the time of the incapacity, and the employee is informed by competent medical authority of the nature and work-related cause of the disease.

Terrell v. Terminix Servs., Inc., 142 N.C. App. 305, 308, 542 S.E.2d 332, 334 (2001) (citing *Taylor*, 300 N.C. at 94, 265 S.E.2d at 144). Thus, the ultimate issue that must be addressed in evaluating Plaintiff's challenge to the Commission's decision to deny and dismiss her occupational disease claim is whether Plaintiff was disabled by one or more occupational diseases and learned of the work-related nature of her condition within two years of the date upon which Plaintiff's request for workers' compensation benefits was submitted to the Commission.

Plaintiff submitted two different claims to the Commission predicated upon alleged bilateral leg injuries stemming from "repetitive work on hard surfaces." Plaintiff claimed that the disability at issue in I.C. No. 110233, which resulted from the Form 19 that she filed in 2001, began on 5 January 2001. In her Form 18 filing in I.C. No. 758157, which was submitted to the Commission on 10 April 2007, Plaintiff alleged that her disability began on 1 August 2005. Plaintiff concedes that the claims asserted in her 5 January 2001 Form 19 are time-barred. Therefore, the ultimate question that we must answer is whether Plaintiff initially became aware of the existence of the work-related disability at issue in the 10 April 2007 Form 18 within the two years preceding the filing of that document.

Plaintiff contends that her plantar fasciitis, pre-1 June 2004 Achilles tendinopathy,² post-1 June 2004 Achilles tendinopathy, and tarsal tunnel syndrome constitute separate occupational diseases and should be evaluated on an individual basis. Although Plaintiff concedes that her plantar fasciitis claim and her claim for pre-1 June 2004 Achilles tendinopathy are barred by the provisions of N.C. Gen. Stat. § 97-58(c), she argues that the same is not true of her tarsal tunnel syndrome and her post-1 June 2004 Achilles tendinopathy claims. In order to reach this conclusion, Plaintiff argues that, since her pre-1 June 2004 Achilles tendinopathy had essentially resolved prior to the date upon which she

2. As we have already indicated, 1 June 2004 is the date upon which Plaintiff began work as a hospice nurse for Duke Health Community Care after having been unemployed for several months.

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began work as a hospice nurse for Duke Health Community Care, her post-1 June 2004 Achilles tendinopathy constituted a new and distinct disability. Plaintiff further argues that she did not definitively learn that her tarsal tunnel syndrome and her post-1 June 2004 Achilles tendinopathy were work-related until a date less than two years prior to the filing of her workers' compensation claim. Based on this logic, Plaintiff contends that her post-1 June 2004 Achilles tendinopathy and her tarsal tunnel syndrome claims were submitted for Commission consideration in a timely manner.

Findings of Fact Nos. 22 through 26 discuss the timeliness of Plaintiff's workers' compensation claims for post-1 June 2004 Achilles tendinopathy and tarsal tunnel syndrome.

20. As of [P]laintiff's February 6, 2001 visit, Dr. Stanley had advised her of his opinion that her development of plantar fasciitis was associated with her employment in the Duke University Medical Center emergency room. According to the evidence, [P]laintiff was first disabled from plantar fasciitis and other foot problems at the end of 2000, when Dr. Stanley took [P]laintiff out of work for approximately five weeks.

21. Plaintiff was informed by Dr. Stanley soon after having been diagnosed with Achilles tend[i]nitis that the condition was related to her employment. According to the medical records, Dr. Stanley made this observation to [P]laintiff by no later than June 2001. Dr. Stanley also testified that he discussed, on multiple occasions, [P]laintiff's diagnoses and her employment's contributions to her conditions. The first surgery for [P]laintiff's Achilles tendon condition was performed in September 2001. Plaintiff was totally disabled following this surgery.

22. Although Dr. Stanley diagnosed [P]laintiff with tarsal tunnel syndrome in 2004 and informed her of this condition's connection to her employment at this time, he had suspected tarsal tunnel syndrome early in his treatment of [P]laintiff. Plaintiff had an EMG nerve conduction study early in 2000 which was negative and again in 2004 which was positive. Dr. Stanley explained that he believed the condition was present throughout the time he treated her, but that tarsal tunnel syndrome is difficult to diagnose and does not necessarily result in EMG nerve conduction study changes.

23. Dr. Stanley also testified that plantar fasciitis and tarsal tunnel syndrome are related conditions, specifically stating, "[I]f

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you have plantar fasciitis, the inflammation can increase pressure in the tarsal tunnel and can lead to tarsal tunnel syndrome. So, they are not uncommonly seen together.”

24. Dr. Stanley’s opinions were reinforced by Dr. Easley, who testified that plantar fasciitis and tarsal tunnel syndrome “overlap” and “go hand in hand,” and further that tarsal tunnel syndrome “is sometimes or frequently difficult to distinguish from plantar fasciitis.”

25. By early 2001, [P]laintiff was informed by her treating physicians that all her foot problems, including possible tarsal tunnel syndrome, were related to her employment. At his deposition Dr. Stanley stated that he and [P]laintiff “had discussions every time I met her about the work requirements and her being on her feet.” Plaintiff was initially disabled from employment related to her foot conditions in 2000 and 2001. Plaintiff’s subsequent foot conditions and periods of disability were all related to the foot problems diagnosed by 2001. Furthermore, [P]laintiff testified that she filed these workers’ compensation claims for the same conditions from which she had suffered for years.

26. Although [P]laintiff was aware of the work-related nature of her foot problems by 2001 and experienced periods of total disability related to her foot problems in 2000 and 2001, [P]laintiff did not file her workers’ compensation claims until April 2007.

In sum, the Commission concluded that Plaintiff’s claims were time-barred because each of the conditions from which Plaintiff suffered had been diagnosed before the beginning of the relevant two-year period, that all of these conditions were interrelated to conditions that had been diagnosed as early as 2001, that she had been continuously experiencing foot-related problems since 2000 or 2001, and that Plaintiff had been clearly advised that the problems she was experiencing with her feet were work-related some six or seven years prior to the date upon which she filed her request for an award of workers’ compensation benefits with the Commission. We see no error in the approach adopted by the Commission.

As previously noted, the two-year period within which an occupational disease claim must be filed with the Commission pursuant to N.C. Gen. Stat. § 97-58(c) begins to run when the employee learns that he or she has a work-related disability stemming from that occupational disease. *Dowdy v. Fieldcrest Mills, Inc.*, 308 N.C. 701, 714, 304

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S.E.2d 215, 223 (1983). Plaintiff's argument that the two-year period prescribed in N.C. Gen. Stat. § 97-58(c) did not begin to run until 2005, based on her new employment beginning 1 June 2004 and an individualized evaluation of each diagnosis, is inconsistent with the essential thrust of prior decisions of this Court.

This Court has previously held that a claimant has only a single workers' compensation claim arising from a particular injury, not a series of separate claims that must be refiled each time the plaintiff reaches a new type of disability. In *Joyner v. J.P. Stevens & Co.*, 71 N.C. App. 625, 627, 322 S.E.2d 636, 637 (1984), *disc. review denied*, 313 N.C. 330, 327 S.E.2d 891 (1985), this Court directly addressed the issue of whether a subsequent change in a plaintiff's disability status created a new "accident" which had the effect of restarting the time limits within which workers' compensation death benefits were required to be filed. In holding that it did not, we stated that "[i]t would defy legislative intent to hold that subsequent changes in disability status arising from the same occupational disease create[] new 'accidents,' thereby renewing the time limit for claiming [N.C. Gen. Stat. §] 97-38 benefits." *Id.*; see also *Wilhite v. Veneer Co.*, 303 N.C. 281, 284, 278 S.E.2d 234, 236 (1981) (stating that "[t]he employee is required to file but a single claim," so that "it was not necessary for [the plaintiff] to file an additional claim for serious bodily disfigurement" given that "[h]is claim based on serious bodily disfigurement was encompassed by defendant's admission of liability and payment of temporary total disability benefits to [the] date of his death") (citing *Smith v. Red Cross*, 245 N.C. 116, 95 S.E.2d 2d 559 (1956)). As a result, we concluded that "the rule limiting occupational disease victims to a single claim for purposes of the statute of limitations in [N.C. Gen. Stat. §] 97-58(c) applies by analogy to allow occupational disease victims to claim only one 'accident' under [N.C. Gen. Stat. §] 97-38" and that "the onset of plaintiff's husband's disability on 23 December 1975 was the only 'accident' from which the [N.C. Gen. Stat. §] 97-38 time limits for benefits ran." *Joyner*, 71 N.C. App. at 627, 322 S.E.2d at 637. We believe that the same logic compels the conclusion that, in instances in which an employee claims to have multiple inter-related and continuous conditions affecting the same part of the body, the employee has only one workers' compensation claim rather than several. Thus, assuming that Plaintiff had a continuing and interrelated series of conditions causing her to suffer from a foot-related disability, the critical question that must be answered in order to determine when the two-year period specified in N.C. Gen. Stat. § 97-58 began to accrue in this case is when Plaintiff first became aware that she had a disability stemming from a work-related occupational disease of her foot.

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Although she strenuously opposes the adoption of the approach which we have described above and deem appropriate, Plaintiff has cited no authority supporting the use of a diagnosis-by-diagnosis method of analysis of the type which she proposes, and we know of none. On the contrary, since an employee has only a single claim rather than multiple claims arising from the same basic set of circumstances, we believe that acceptance of Plaintiff's argument would be inconsistent with the "single-claim" rubric adopted in *Joyner* and *Wilhite* by requiring the filing of multiple claims arising from a single, continuous, interrelated occupational disease.³ In addition, the adoption of Plaintiff's preferred approach would require the filing of multiple workers' compensation claims arising from the same basic set of facts, with a new filing being required on each occasion when a plaintiff's diagnosis changed. We do not believe that such a result would be beneficial for either employees or employers in the vast majority of cases. We agree with Plaintiff that an employee should not be barred from filing separate claims at separate times based upon injuries to, or occupational diseases affecting, different parts of his or her body, or upon separate and distinct injuries to, or occupational diseases of, the same part of the body. However, employees who have developed a continuous, interrelated work-related disability to the same part of the body should be required to assert their claims for workers' compensation benefits within two years of the date upon which they first learned that they had a work-related disability associated with that part of their body. In addition to its consistency with prior decisions of this Court and the Supreme Court, this approach has the merit of requiring the presentation of claims at a time when the relevant medical information is "fresher" and more attention can be paid to the medical treatment received by the employee.⁴ Thus, we believe that the approach we have adopted for purposes of analyzing Plaintiff's challenge to the Commission's order is more consistent with the intent of the relevant statutory provisions, the relevant decisional law, and

3. Plaintiff is technically correct in arguing that *Joyner* is distinguishable from the present case in that the earlier case dealt with a change in disabilities rather than a change in diagnoses. However, we believe that the "single claim" logic adopted in *Joyner* and *Wilhite* provides us with helpful guidance in deciding this case.

4. According to Plaintiff, the interpretation of the relevant statutory provisions and decisions that we have adopted in this case creates the risk that an employee would be forever barred from seeking workers' compensation benefits in the event that he or she failed to make the necessary filing with the Commission following a short period of disability stemming from a relatively minor occupational disease and then developed more serious problems associated with the same part of the body at a later time. We do not believe that the prudential concern expressed by Plaintiff is well-founded. As we have expressly stated above, the rule we believe to be most consistent

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sound policy considerations than the approach upon which Plaintiff's claims are premised.

The record clearly establishes that Plaintiff was aware of the connection between her foot problems, which underlie her claim for workers' compensation benefits, and the conditions of her employment by at least 2001 and that the foot problems, upon which her present claim for workers' compensation benefits is predicated, are interrelated with and part and parcel of the problems from which she suffered in earlier years. In his deposition, Dr. Stanley testified that, "very early on in my treatment of [Plaintiff], we talked about her job and the fact that it was contributing to the condition and exacerbating her symptoms." Plaintiff and Dr. Stanley discussed the possibility that Plaintiff was entitled to workers' compensation benefits as early as 2001, at which point Dr. Stanley "encouraged" Plaintiff to seek such benefits. As of 6 February 2001, Plaintiff had been diagnosed with "Achilles [t]end[i]nitis on the right side," which Dr. Stanley believed to be "related to the plantar fasciitis and the alteration of [Plaintiff's] gait." The Achilles tendinopathy from which Plaintiff suffered in 2005 following her employment as a hospice nurse was a chronic condition, rather than a new difficulty that developed for the first time after 1 June 2004. Although Dr. Stanley suspected that Plaintiff suffered from tarsal tunnel syndrome as early as 2000, he determined that certain EMG nerve conduction results suggested tarsal tunnel syndrome in 2004 and referred Plaintiff to Dr. Nunley. After examining Plaintiff in 2004, Dr. Nunley diagnosed her with tarsal tunnel syndrome, among other conditions, and would, consistent with his usual course of practice, have informed Plaintiff of his opinion at that time. According to Dr. Easley, it is frequently difficult to distinguish tarsal tunnel syndrome from plantar fasciitis. In fact, Dr. Easley testified that plantar fasciitis and tarsal tunnel syndrome "overlap" and "go hand in hand." Similarly, Dr. Stanley testified that plantar fasciitis and tarsal tunnel syndrome are commonly seen together. Plaintiff herself admitted

with the relevant statutory provisions and prior decisions only applies to situations involving an interrelated, continuing condition associated with the same part of the body. For that reason, we do not believe that the approach we have deemed appropriate here will result in the denial of workers' compensation benefits to an employee who is briefly disabled due to a minor condition and then has further, unrelated problems with the same part of his or her body at a later time. When forced to choose between the problems that will be created by treating every new diagnosis as a new claim and the problems associated with barring the claims of a plaintiff who fails to file his or her claim for workers' compensation benefits despite the existence of a disability due to a continuous and interrelated condition in the same part of the body, we prefer the approach that we have adopted in this case, since it will stimulate the filing of claims in a timely manner without creating an undue risk that genuinely meritorious claims that could not have reasonably been brought at an earlier time will be deemed time-barred.

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that she was aware of the work-related nature of her foot problems by 2001. Finally, Dr. Stanley expressed the opinion that Plaintiff was temporarily totally disabled during 2001. As a result, the record evidence clearly shows that Plaintiff knew that she had a foot-related disability that was causally connected to the conditions that existed at her place of employment by 2001, some six years before she filed a claim for workers' compensation benefits with the Commission, and that her condition in 2005 was interrelated with and had been continuously similar to her condition for the last several years. As a result, we hold that the Commission correctly concluded that Plaintiff failed to file her claim for workers' compensation benefits in a timely manner and that her non-compliance with N.C. Gen. Stat. § 97-58(c) precluded the Commission from hearing her claims.

III. Conclusion

As a result, we conclude that the Commission correctly determined that Plaintiff failed to file her claims for workers' compensation benefits in a timely manner and that her claims should be denied and dismissed for that reason. Thus, the Commission's order should be, and hereby is, affirmed.

AFFIRMED.

Judges BRYANT and ELMORE concur.

STATE OF NORTH CAROLINA v. DAMIEN LANEL GABRIEL

No. COA09-1669

(Filed 19 October 2010)

1. Criminal Law— jury instructions—acting in concert—first-degree murder—assault with deadly weapon with intent to kill inflicting serious injury

The trial court did not err in a first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury case by instructing the jury on acting in concert. It was undisputed that defendant was present at the scene and there was sufficient evidence that defendant and another individual were shooting at the victims pursuant to a common plan or purpose.

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2. Evidence— extrinsic evidence—impeachment—not improper

The trial court did not err by admitting into evidence the transcript of a witness's out-of-court statements to the police to impeach his testimony. The witness's statements were material and his testimony was inconsistent in part with his prior statements.

3. Evidence— transcript of out-of-court statements—impeachment—not as subterfuge for inadmissible hearsay

The trial court did not err by admitting into evidence the transcript of a witness's out-of-court statements to the police to impeach his testimony. The circumstances indicated that the State called the witness to testify in good faith and not as a subterfuge to put his otherwise inadmissible hearsay before the jury.

4. Evidence— impeachment—probative value not outweighed by prejudicial effect

The trial court did not err by admitting into evidence the transcript of a witness's out-of-court statements to the police to impeach his testimony. The probative value of the transcripts was not substantially outweighed by the dangers of unfair prejudice, confusion of the issues, or misleading the jury.

Appeal by Defendant from judgments entered 9 April 2009 by Judge Jesse B. Caldwell, III in Mecklenburg County Superior Court. Heard in the Court of Appeals 18 August 2010.

Attorney General Roy Cooper, by Special Deputy Attorney General H. Dean Bowman, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Constance E. Widenhouse, for Defendant.

STEPHENS, Judge.

Facts

On 28 August 2006, Defendant Damien Lanel Gabriel was indicted in Mecklenburg County, North Carolina on one count of first-degree murder and one count of assault with a deadly weapon with intent to kill inflicting serious injury. Defendant pled not guilty to the charges and was tried by a jury in Mecklenburg County Superior Court.

The evidence presented at trial tended to show the following: On the evening of 3 August 2006, murder victim Jerome Tallington and assault victim Kenneth Lackey were at the home of Tallington's

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fiancée Tara McGhee. McGhee's home was across the street from the residence of Dennis Brown. That evening, Brown was at his home with his mother and Shaun Ryan, the brother of Brown's girlfriend.

Shortly after Lackey and Tallington arrived at McGhee's home, Defendant pulled up to Brown's house in a gray station wagon and exited the vehicle holding a long gun, described by witnesses as having a banana-shaped bullet pouch and being similar in size and shape to an AK-47. Defendant entered Brown's house and re-emerged shortly thereafter. Witnesses testified that after an exchange of words in the street between the victims and Defendant, several gun shots were fired.

Following the shooting, Defendant was seen entering Brown's home. When police officers arrived at the scene, Defendant's gray station wagon was still parked in front of Brown's house, Lackey was on McGhee's porch, and Tallington, who had been shot twice, was lying dead at the end of Brown's driveway. The SWAT team was called in, the neighborhood was locked down, and a stand-off between law enforcement officers and the occupants of Brown's house ensued for several hours until, at last, Brown and his mother came out of Brown's house. During their investigation of the crime scene, police found several spent bullet cartridges near the end of Brown's driveway. Bullet holes were found in McGhee's truck, as well as in other vehicles parked in front of McGhee's house, and in McGhee's porch posts and in the house next door to McGhee.

The evidence showed that along the back edge of Brown's backyard was a fence that separated Brown's backyard and a wooded area, and beyond the wooded area was a shopping center. A gate in the fence opened to a path through the wooded area and came out at the back of the shopping center. An officer who was positioned behind the shopping center on the night of the shooting testified that a black male, whom she later identified as Defendant, walked by her car that night.

On 4 August 2006, the day after the shooting, officers found a weapon resembling an AK-47 in the woods behind Brown's house. The shell casings and a bullet from the scene of the shooting were matched to the gun found in the woods. Another shell casing was found near the side of Brown's house, but this casing did not match the gun from the woods.

On the afternoon of August 4, Defendant turned himself in to the Charlotte-Mecklenburg Police Department. While in police custody,

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Defendant made several phone calls to Brown, in which Defendant asked Brown to look for the “chopper.” Testimony at trial revealed that “chopper” is a slang term that often refers to a semiautomatic rifle.

While imprisoned, Defendant also called his father Effrod Young. According to Young’s testimony, Defendant told Young, “I was just taking [the gun] to give it to him. I got caught in the middle. When I got out of the car, they ran up on me and started talking.” Young also testified that he spoke with Ryan, who admitted to Young that he was in Brown’s backyard when he heard a gunshot that came from in front of the house. According to Young’s testimony, Ryan stated that he then ran around to the front of Brown’s house, ducked behind a car, and “emptied” his ammunition clip while firing at a “guy.” Ryan testified, however, that although he did not recall any specific events from 3 August 2006, he knew he did not shoot anyone.

Following the presentation of the evidence, the trial court instructed the jury on possible verdicts of murder and assault with a deadly weapon. The court further instructed that the jury could find Defendant guilty of any of the crimes if they found that the Defendant, “or someone with whom he acted in concert,” committed the crime.

On 8 April 2009, the jury returned verdicts finding Defendant guilty of first-degree murder and assault with a deadly weapon with the intent to kill. On 9 April 2009, Defendant was sentenced to life imprisonment without parole for the murder charge and to 46 to 65 months imprisonment for the assault charge. Defendant appeals.

*Discussion**I. Improper instruction of the jury on acting in concert*

[1] On appeal, Defendant first argues that the trial court’s jury instruction on acting in concert was error because that theory of guilt was not supported by the evidence. We disagree.

Assignments of error challenging the trial court’s jury instructions are reviewed *de novo* by this Court. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). Our Supreme Court has held that it is error for the trial judge “to permit a jury to convict upon some abstract theory not supported by the evidence[.]” *State v. Dammons*, 293 N.C. 263, 272, 237 S.E.2d 834, 840 (1977).

In order to support a jury instruction on acting in concert, the evidence must be sufficient to show that the defendant was present at the

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scene of the crime and that the defendant was acting together with another who did the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime. *See State v. Joyner*, 297 N.C. 349, 357, 255 S.E.2d 390, 395 (1979). Whether there was sufficient evidence to support the trial court's instruction on acting in concert must be determined based on the varying facts of each case. *State v. Dickens*, 346 N.C. 26, 39, 484 S.E.2d 553, 560 (1997); *State v. Jefferies*, 333 N.C. 501, 512, 428 S.E.2d 150, 156 (1993); *Joyner*, 297 N.C. at 358, 255 S.E.2d at 396.

Defendant argues that the evidence tended to support only two theories: (1) that Defendant committed all of the acts constituting the crimes of felonious assault and murder, or (2) that Ryan committed all, and Defendant committed none, of the acts constituting the alleged crimes. Defendant contends that neither of these views of the evidence supported an instruction on concerted action.

Defendant argues that the first theory of the evidence did not support an instruction on acting in concert because it tended to show that Defendant acted alone, and not "together with another." We agree that under this view of the evidence, an instruction on acting in concert would be erroneous. It is well settled in North Carolina that the doctrine of acting in concert requires the action of two or more people. *See, e.g., State v. Wilkerson*, 363 N.C. 382, 424, 683 S.E.2d 174, 200 (2009), *cert. denied*, — U.S. —, 176 L. Ed. 2d 734 (2010); *State v. Thomas*, 325 N.C. 583, 595, 386 S.E.2d 555, 561 (1989).

As for Defendant's second theory, Defendant argues there was a lack of evidentiary support for a common plan or shared purpose between Ryan and Defendant such that this second view of the evidence did not support a jury instruction on acting in concert. We disagree with Defendant's theory in this respect.

Defendant cites *State v. Forney*, 310 N.C. 126, 310 S.E.2d 20 (1984), in support of his argument. In *Forney*, our Supreme Court found that although the evidence showed that the defendant was present during, and aware of, a sexual assault committed by others, the defendant's statement that he was " 'thrown' on the victim but 'didn't do nothin[g]' " tended to be "exculpatory with respect to his willingness to participate in or even his knowledge or acquiescence in consummating this offense." *Id.* at 134, 310 S.E.2d at 25. The Court reversed the defendant's conviction because the evidence was insufficient to permit a reasonable inference that the defendant and the others were acting together in pursuance of a common plan to commit sexual assault. *Id.*

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In this case, as in *Forney*, Defendant's statement that he was just taking the gun to Brown's house when he "got caught in the middle" tended to be "exculpatory with respect to his willingness to participate" in the shooting. However, unlike in *Forney*, there was other evidence to support a reasonable inference that Defendant and Ryan acted together pursuant to a common plan or purpose.

The evidence in support of Defendant's theory tended to show that Ryan came around the house after hearing a gunshot and fired repeatedly at, and consistently hit, a person in the front yard. Assuming its truth, this evidence did not contradict any of the other evidence tending to show that Ryan was at Brown's house on the day of the shooting; that when Defendant arrived he went inside Brown's house with the weapon; that Defendant claimed to have brought the gun for someone else; and that, at the time of the shooting, Defendant was in front of Brown's house with a weapon and was firing in the direction of the victims in the street. We conclude that this evidence did permit a reasonable inference that Defendant and Ryan were shooting at the victims pursuant to a shared or common purpose.

Accordingly, the reasonable inference of a common plan or purpose, along with Defendant's undisputed presence at the scene, was sufficient to support the court's instruction on acting in concert. Therefore, we hold that the trial court did not err by instructing the jury on acting in concert.

II. Improper admission of Dennis Brown's out-of-court statements

[2] Defendant next argues that the trial court erred by admitting into evidence Dennis Brown's out-of-court statements to the police. We review *de novo* a trial court's determination of whether an out-of-court statement is admissible. *See, e.g., State v. Minter*, 111 N.C. App. 40, 432 S.E.2d 146 (reviewing *de novo* a trial court's decision to allow extrinsic evidence of a witness's hearsay statements), *disc. rev. denied*, 335 N.C. 241, 439 S.E.2d 158 (1993).

At trial, the State called Brown to testify regarding the events leading up to, and immediately following, the shooting. Brown testified that he did not call Defendant on the day of the shooting and ask Defendant to bring a gun to Brown's house and also that he did not recall whether he saw Defendant enter Brown's house with a weapon immediately after the shooting. Because this testimony was inconsistent with Brown's prior statements to police, the State moved the court to allow the State to treat Brown as a hostile witness. After the court granted the motion

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over Defendant's objection, the State extensively cross-examined Brown on his prior statements. Brown denied telling police officers that he called Defendant to bring a gun and denied telling officers that he saw Defendant with a gun following the shooting.

The State later attempted to introduce a redacted version of a transcript of Brown's prior statements. Over Defendant's objection, the trial court ruled the statements admissible for the purpose of impeaching Brown's credibility. The portion of the transcript at issue in this appeal is excerpted below:¹

P Alright. Um, earlier we were talking about you said that Sean . . . or I mean that [Defendant] had something in his hand. What did you notice that [Defendant] had in his hand?

B Something long[]

P Okay.

B . . . like a rifle or something.

P Alright. So you saw him with a gun?

B Yes.

. . . .

P Okay, but you saw [Defendant] with the gun.

B Yes.

. . . .

H Uh huh. Well, this shooting happened at 10:46.

B I don't know, maybe fifteen minutes before he got there . . . cause he called me like bring a gun if your [sic] coming back.

H So he called you or you called him?

B I called him.

On appeal, Defendant asserts three separate grounds to support his argument that admission of these statements was error. Because each argument proceeds on a different theory, we address each separately.

A. Improper use of extrinsic evidence for impeachment

Defendant first argues that the admission of the transcript of the statements for the purpose of impeachment by prior inconsistent state-

1. In the excerpt, P and H are police officers and B is Brown.

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ments was error because it was introduced to impeach Brown on the collateral matter of whether Brown did or did not make the statements.

In support of this argument, Defendant cites *State v. Hunt*, 324 N.C. 343, 378 S.E.2d 754 (1989). In *Hunt*, our Supreme Court applied the longstanding rule against using extrinsic evidence to impeach a witness on collateral matters, to prohibit the introduction of the substance of a prior statement to impeach a witness's *denial* that he made that prior statement because the truth or falsity of that denial was a collateral matter. *Id.* at 348-49, 378 S.E.2d at 757.

However, this Court has since held that in cases where the witness not only denies making the prior statements *but also testifies inconsistently* with the prior statements, *Hunt* does not prohibit impeaching a witness's *inconsistent* testimony with the substance of the prior statements. *See State v. Wilson*, 135 N.C. App. 504, 507, 521 S.E.2d 263, 264-65 (1999); *Minter*, 111 N.C. App. at 48-49, 432 S.E.2d at 151. In this case, the substance of Brown's prior statements was admitted to impeach Brown's inconsistent testimony, and not Brown's denial. Therefore, the holding in *Hunt* does not require exclusion of the prior statements here.

Regardless, Defendant further argues that because Brown denied making the relevant statements, "the [S]tate could impeach Brown regarding whether he made the entire statement, but it could not properly introduce extrinsic evidence of the substance of those statements." We are unpersuaded by Defendant's argument.

It has long been the law in North Carolina that where a witness's prior inconsistent statements are material, those statements may be proved by extrinsic evidence without first calling the prior statements to the attention of the witness on cross-examination. *See, e.g., State v. Green*, 296 N.C. 183, 192-93, 250 S.E.2d 197, 203 (1978) (cited in *Hunt*, 324 N.C. at 348, 378 S.E.2d at 757).

Under this rule, impeaching counsel need not give the witness an opportunity to admit or deny making the prior inconsistent statements before presenting extrinsic evidence of those statements. *Id.* Therefore, Brown's denial is irrelevant to the determination of whether extrinsic evidence could have been presented. Rather, all that was necessary was that the witness testified inconsistently and that the subject matter of the prior statements was material. *See State v. Whitley*, 311 N.C. 656, 663, 319 S.E.2d 584, 589 (1984) (holding that because a witness's prior statement was inconsistent with her testimony in part, and because the

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prior statement was material, the trial court did not err in allowing the State to prove the witness's prior inconsistent statements with extrinsic evidence).

In this case, there can be no doubt that Brown's statement that he called Defendant to bring a gun and Brown's two statements that he saw Defendant with a gun were material in that these statements related to the events leading up to, and immediately following, the shooting in front of Brown's house. *See id.* (holding that the witness's prior statement was "material in that it related to events immediately leading to [the crime committed]"). Further, Brown's testimony was inconsistent in part with the prior statements. Accordingly, extrinsic evidence of Brown's prior statements was permissible to impeach Brown's testimony. *Id.* Defendant's argument is overruled.

B. Violation of Rule 607

[3] Defendant next argues that the admission of Brown's out-of-court statements for the purpose of impeachment was error on the ground that "the prosecutor used the guise of impeaching its own witness as a subterfuge for putting otherwise inadmissible hearsay before the jury when the record failed to show the prosecutor was surprised by Brown's in-court testimony[.]" Specifically, Defendant argues that while North Carolina Rule of Evidence 607 allows any party to attack the credibility of a witness, the use of Rule 607 to mask impermissible hearsay as impeachment is improper because of the likelihood a jury will consider the statements as substantive evidence rather than as impeachment evidence. *See* N.C. Gen. Stat. § 8C-1, Rule 607 (2009).

Defendant again cites *Hunt* in support of his argument. In *Hunt*, our Supreme Court recognized "the difficulty with which a jury distinguishes between impeachment and substantive evidence and the danger of confusion that results[.]" *Hunt*, 324 N.C. at 349, 378 S.E.2d at 757. Accordingly, our Supreme Court acknowledged that the "overwhelming weight of federal authority with regard to the use of the identical Fed. R. Evid. 607 has long been that impeachment by prior inconsistent statement may not be permitted where employed as a *mere subterfuge* to get before the jury evidence not otherwise admissible." *Id.* (internal quotation marks and brackets omitted; emphasis in original).

The Court in *Hunt* further noted that

[i]t is the rare case in which a federal court has found that the introduction of hearsay statements by the state to impeach its own witness was not motivated primarily (or solely) by a desire

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to put the substance of that statement before the jury. Circumstances indicating good faith and the absence of subterfuge in these exceptional cases have included the facts that the witness's testimony was extensive and vital to the government's case; that the party calling the witness was genuinely surprised by his reversal; or that the trial court followed the introduction of the statement with an effective limiting instruction.

Id. at 350, 378 S.E.2d at 758 (citations omitted).

Our Supreme Court went on to apply these indicia of "good faith and the absence of subterfuge" to the facts in *Hunt* and ultimately found that the "circumstances accompanying the introduction of [the witness's] prior unsworn statement provide no assurance either that [the witness's] testimony was critical to the state's case or that it was introduced altogether in good faith and followed by effective limiting instructions." *Id.* at 351, 378 S.E.2d at 758-59.

In this case, Defendant argues that none of the circumstances indicating good faith were present with respect to the impeachment of Brown, such that the impeachment by prior inconsistent statements was impermissible. We disagree.

The most notable difference between this case and *Hunt* is the presence of an effective limiting instruction. In *Hunt*,

[while] the trial court initially indicated that the jury was to consider [the witness's] prior unsworn statements for the limited purpose of later determining the officer's credibility, the court failed to include a subsequent similar warning either when the statements were read to and denied by [the witness] or when they were reiterated during the direct examination of the officer. Instructions regarding the statements during the final charge were no less ambiguous.

Moreover, by the time the statements were actually introduced as exhibits, they were before the jury as substantive evidence, and all earlier apparent efforts to restrict their use to impeachment of [the witness] or corroboration of the officer's testimony were mooted by their substantive use.

Id. at 351-52, 378 S.E.2d at 759.

In this case, however, the introduction of Brown's prior statements was preceded by a limiting instruction explaining to the jury that "the Court is allowing these exhibits to be admitted for one pur-

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pose and for one purpose alone, and that purpose is what is known as impeachment of certain testimony of the witness, Dennis Brown.” These instructions are sufficient for the jury to distinguish this evidence as impeachment evidence, rather than substantive evidence.

Further, unlike in *Hunt* where the witness’s testimony “consisted entirely of responding to challenges to her credibility[,]” in this case Brown’s testimony was valuable to the State’s case in that it described Brown’s home and backyard in relation to the path through the woods leading to the shopping center where Defendant was spotted after the shooting, it laid the foundation for admission of Defendant’s telephone calls from prison to Brown, and it corroborated other eyewitness testimony. *Id.* at 351, 378 S.E.2d at 758.

Finally, the facts of this case do not indicate, as the facts in *Hunt* did, that “the state appeared to know before [the witness] was called to the stand that she would not cooperate by reiterating her prior statements.” *Id.* In this case, while Brown’s “lack of cooperation with the State and his failure to appear voluntarily until []after being served with a show-cause order” certainly tend to show that Brown was reluctant to testify at Defendant’s trial, there is nothing to indicate that the State knew Brown would refuse to testify to, or would testify inconsistently with, the matters contained in Brown’s prior statement.

Based on the foregoing, we conclude that the circumstances in this case indicate that the State called Brown to testify in good faith and not as a subterfuge to put Brown’s out-of-court statements before the jury “in the hope that the jury would miss the subtle distinction between impeachment and substantive evidence[.]” *Id.* at 349-50, 378 S.E.2d at 758 (quoting *United States v. Webster*, 734 F.2d 1191, 1192 (7th Cir. 1984)). Defendant’s argument is overruled.

C. Violation of Rule 403

[4] Finally, Defendant argues that the redacted transcript of Brown’s out-of-court statements should have been excluded under Rule 403 because any probative value of the statements was substantially outweighed by the dangers of unfair prejudice, confusion of the issues, and misleading the jury. The State contends, however, that because Defendant failed to object to the introduction of Brown’s prior statements at trial based on Rule 403, our review is limited to plain error.

Based on this Court’s review of the record, Defendant objected to the introduction of Brown’s prior statements solely on the bases of

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improper use of extrinsic evidence and improper introduction of hearsay statements under the guise of impeachment.

As discussed *supra*, Defendant's objection based on the State's alleged improper introduction of the statements under the guise of impeachment implicates North Carolina Rule of Evidence 607, which provides that "[t]he credibility of a witness may be attacked by any party, including the party calling him." N.C. Gen. Stat. § 8C-1, Rule 607. This Court has noted that Rule 607 "too easily camouflages a ruse whereby a party may call an unfriendly witness *solely* to justify the subsequent call of a second witness to testify about a prior inconsistent statement." *State v. Bell*, 87 N.C. App. 626, 633, 362 S.E.2d 288, 292 (1987) (emphasis in original). Because of the real danger that Rule 607 "would make fair game of almost any out-of-court statement ever made by any witness[,]" *id.*, including those statements that do not actually impeach the witness but only tend to confuse the jury or unfairly prejudice the defendant, our Courts have grafted onto Rule 607 the requirement that the "impeachment should only be allowed when '[c]ircumstances indicating good faith and the absence of subterfuge' are present." *State v. Lanier*, 165 N.C. App. 337, 352, 598 S.E.2d 596, 606 (quoting *Hunt*, 324 N.C. at 350, 378 S.E.2d at 758) (brackets in original), *disc. rev. denied*, 359 N.C. 195, 608 S.E.2d 59 (2004). Further, this Court has noted that the Commentary to Rule 607 "cautions that '[t]he impeaching proof must be *relevant* within the meaning of Rule 401 and Rule 403 and *must in fact be impeaching.*'" *Bell*, 87 N.C. App. at 633, 362 S.E.2d at 292 (quoting N.C. Gen. Stat. § 8C-1, Rule 607 (Commentary)) (brackets and emphasis in original).

Accordingly, where a party seeks to impeach its own witness under Rule 607, that impeachment must not be a subterfuge to get hearsay statements in front of the jury and must be relevant within the meaning of Rule 403. *Lanier*, 165 N.C. App. at 352, 598 S.E.2d at 606; *Bell*, 87 N.C. App. at 633, 362 S.E.2d at 292. Therefore, we hold that Defendant's Rule 607 objection to the introduction of Brown's hearsay statements "under the guise of impeachment" sufficiently implicated the application of Rule 403.

As for the substance of Defendant's objection, Defendant argues that the prejudicial effect of the statements far outweighed the State's need to attack Brown's credibility, such that the evidence should have been excluded. We disagree.

The State introduced the hearsay statements to impeach Brown's inconsistent testimony regarding the material matters of whether

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Brown saw Defendant with a gun and whether Brown called Defendant and asked Defendant to bring a weapon to Brown's house. Our Supreme Court has held that evidence tending to impeach material testimony has probative value. *State v. Younger*, 306 N.C. 692, 697, 295 S.E.2d 453, 456 (1982) (holding that a witness's "prior statement . . . , which was inconsistent with her testimony at [trial], has a strong probative value, especially since it relates directly to her account of the incident and those events leading up to it").

Defendant argues further that the hearsay statements were obviously prejudicial because they "significantly strengthened the [S]tate's proof that [Defendant] was the actual shooter or acted in concert with someone who was." Defendant's argument misapprehends the meaning of Rule 403. Evidence is not excluded under the Rule simply because it is probative of the offering party's case and is prejudicial to the opposing party's case. Rather, the evidence must be *unfairly* prejudicial. See N.C. Gen. Stat. § 8C-1, Rule 403 (2009); see also *State v. Mercer*, 317 N.C. 87, 95, 343 S.E.2d 885, 890 (1986) (stating that "highly probative evidence necessarily is prejudicial to the defendant[,] otherwise it would not have such great probative value[,] and finding that Rule 403 requires exclusion only where the prejudicial effect is found to be undue).

In this case, any unfair prejudice from Brown's statements could only have come from the jury's improper consideration of the impeachment evidence as substantive evidence. As discussed *supra*, however, the trial court preceded the admission of the statements with an effective limiting instruction. Furthermore, although Defendant objected to the introduction of the statements, Defendant did not object to the instruction itself. Because the law presumes that the jury properly considered the statements only for their effect on Brown's credibility, any prejudice to Defendant's case cannot be deemed unfair. See *State v. Miller*, 197 N.C. App. 78, 93, 676 S.E.2d 546, 555 (stating that our Courts presume that jurors attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them), *disc. rev. denied*, 363 N.C. 586, 683 S.E.2d 216 (2009). Therefore, the trial court did not err in admitting Brown's statements under Rule 403. Defendant's argument is overruled.

Defendant received a fair trial, free of error.

NO ERROR.

Judges STEELMAN and HUNTER, JR. concur.

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IN THE MATTER OF: K.D.L.

No. COA09-1653

(Filed 19 October 2010)

Juveniles— delinquency—suppression of statements—custodial interrogation—failure to give Miranda warnings—failure to give warnings required by statute

The trial court committed reversible error in a juvenile delinquency case by denying the juvenile's motion to suppress statements he made to the principal of his school and a deputy. The juvenile made the statements in the course of a custodial interrogation without having been afforded the warnings required by *Miranda* and N.C.G.S. § 7B-2101(a), and the juvenile was not apprised of and afforded his right to have a parent present, in violation of his constitutional and statutory rights.

Appeal by juvenile from order entered 24 August 2009 by Judge Craig Croom in Wake County District Court. Heard in the Court of Appeals 18 August 2010.

Attorney General Roy Cooper, by Assistant Attorney General Amanda P. Little, for the State.

Geeta Kapur for juvenile-appellant.

HUNTER, JR., Robert N., Judge.

Oliver,¹ age twelve, appeals the trial court's final order adjudicating him delinquent and entering a level 1 disposition. He argues the trial court erred when it failed to suppress several incriminating statements made while he was being detained by a school resource officer and school officials. When a juvenile gives incriminating statements in the course of custodial interrogation without being afforded the warnings required by *Miranda v. Arizona*, 384 U.S. 436, 478-79, 16 L. Ed. 2d 694, 726 (1966), and N.C. Gen. Stat. § 7B-2101(a) (2009), and without being afforded his right to have a parent present during interrogation pursuant to N.C. Gen. Stat. § 7B-2101(b) (2009), the denial of his motion to suppress is error. We hold the trial court erred in denying Oliver's motion to suppress.

1. Pseudonyms are used to conceal the identities of the juveniles involved in this case.

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I. Jurisdiction and Standard of Review

After the trial court entered a final order adjudicating Oliver delinquent and entering a level 1 disposition, Oliver gave oral notice of appeal at his hearing. Therefore, we have jurisdiction over his appeal. *See* N.C. Gen. Stat. § 7B-2602 (2009) (stating appeal shall be to this Court if a proper party gives oral notice of appeal from a final order at a juvenile hearing); N.C. Gen. Stat. § 7B-2604 (2009) (stating a juvenile is a proper party).

II. Background

This appeal stems from a teacher's discovery of a plastic bag of marijuana on a classroom floor at East Millbrook Middle School in Raleigh. The teacher suspected the marijuana belonged to Oliver and escorted him to Assistant Principal Jewett's office in Building 9. The school resource officer, Deputy Holloway, was contacted by the school's head principal, Mr. Livengood. When Deputy Holloway arrived at the principal's office, he observed Oliver sitting with Principal Livengood who had been questioning Oliver about the incident. Principal Livengood informed Deputy Holloway of what had transpired. The two adults spoke with Oliver before Deputy Holloway briefly left to inspect the classroom where the marijuana was discovered.

Deputy Holloway returned to Principal Jewett's office and took Oliver to his vehicle to be transported to Principal Livengood's office in another building. Deputy Holloway testified that he patted down Oliver to ensure he had no weapons before letting him into the patrol car because there is a history of weapons at the school. Deputy Holloway also testified that he spoke with Oliver while transporting him, offering words of advice and encouragement, but did not ask him any questions. Oliver was not placed in handcuffs.

Principal Livengood questioned Oliver in his office beginning around 9:00 a.m. while Deputy Holloway was in the room. Deputy Holloway testified Oliver first denied the marijuana was his, but when Holloway was in the restroom, Oliver admitted to Principal Livengood it belonged to him. Oliver also revealed he had another bag of marijuana as well as some cash, all of which Deputy Holloway saw on the table when he returned from the restroom. The questioning continued, and Oliver confessed he purchased the marijuana from two other students, Charlie and Bill. Oliver was instructed to wait outside the office. He remained outside the office while Principal Livengood questioned the other two students, but he was not guarded by Deputy Holloway, who remained inside the office. Charlie and Bill quickly

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admitted to selling a bag of marijuana to Oliver, and apparently left the principal's office.

Principal Livengood brought Oliver back into his office and resumed questioning him with Deputy Holloway present. Deputy Holloway testified that Principal Livengood questioned Oliver for about five or six hours that day because Oliver changed the details of his story several times during the questioning. It appears from the record that Oliver was not permitted to leave for lunch. At around 3:00 p.m., Principal Livengood contacted Oliver's mother to inform her of what had transpired and that Oliver would be suspended. Deputy Holloway left school around that time and testified that, to his knowledge, the principal had not fully concluded matters involving Oliver because his mother had not yet arrived to collect him. Deputy Holloway testified he did not ask Oliver any questions during the principal's investigation. At no point was Oliver read his *Miranda* rights, nor was he told he was entitled to speak with his parents or have them present during questioning.

On 3 March 2009, Deputy Holloway filed juvenile petitions alleging Oliver committed two offenses: (1) felony possession of marijuana with intent to sell and deliver a controlled substance and (2) selling or delivering a controlled substance. Oliver filed a motion to suppress. Neither Oliver nor the other two children presented evidence during the suppression hearing—only Deputy Holloway testified. The trial court, Judge Robert Rader presiding, denied Oliver's motion to suppress, concluding Deputy Holloway's presence during the principal's investigation did not transform the encounter into custodial interrogation: “[T]he officer never ask[ed any] questions. The officer actually left. At one point they left—they took breaks. . . . I don't think it would rise to the level of custodial interrogation under the current law. So motion is denied.” Oliver waived his right to a probable cause hearing and stipulated to a finding of probable cause for the offenses.

Pursuant to a plea agreement, the State dismissed the charge of selling or delivering a controlled substance of marijuana and amended the charge of felony possession of marijuana to the lesser offense of misdemeanor possession of marijuana. Oliver entered an admission to one count of misdemeanor possession of marijuana and reserved his right to appeal the denial of his motion to suppress. The trial court, Judge Craig Croom presiding, adjudicated Oliver delinquent and entered a level 1 disposition, placing Oliver on probation for six months. Oliver appealed from this order.

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III. Analysis

Oliver argues the trial court committed reversible error in denying his motion to suppress because he was subjected to custodial interrogation in violation of his Fifth Amendment right against compelled self-incrimination and his statutory rights provided by the North Carolina Juvenile Code. After review, we conclude Oliver's confession should have been suppressed.

A. Standard of Review

Generally, an appellate court's review of a trial court's order on a motion to suppress is strictly limited to a determination of whether its findings are supported by competent evidence, and in turn, whether the findings support the trial court's ultimate conclusion. Where, however, the trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal. . . . [W]e [then] review the trial court's order to determine only whether the findings of fact support the [conclusions of law]

State v. Roberson, 163 N.C. App. 129, 132, 592 S.E.2d 733, 735-36 (2004) (citations and internal quotation marks omitted). Legal conclusions, including the question of whether a person has been interrogated while in police custody, are reviewed *de novo*. *State v. Greene*, 332 N.C. 565, 577, 422 S.E.2d 730, 737 (1992).

Before proceeding further, we note the trial court failed to make explicit findings of fact before denying Oliver's motion to suppress. At the conclusion of the hearing, the court's only remarks were that "the officer never ask[ed any] questions. The officer actually left. At one point they left—they took breaks." Findings of fact and conclusions of law "are required in order that there may be a meaningful appellate review of the decision." *State v. Horner*, 310 N.C. 274, 279, 311 S.E.2d 281, 285 (1984). In *State v. Phillips*, our Supreme Court provided the following guidance:

When the competency of evidence is challenged and the trial judge conducts a voir dire to determine admissibility, the general rule is that he should make findings of fact to show the bases of his ruling. If there is a material conflict in the evidence on voir dire, he *must* do so in order to resolve the conflict. If there is no material conflict in the evidence on voir dire, it is not error to admit the challenged evidence without making specific findings of fact, although it is always the better practice to find all facts

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upon which the admissibility of the evidence depends. In that event, the necessary findings are implied from the admission of the challenged evidence.

300 N.C. 678, 685, 268 S.E.2d 452, 457 (1980) (citations omitted). In *Phillips*, the trial court failed to make findings of fact before denying the defendant's motion to dismiss. *Id.* at 685-86, 268 S.E.2d at 457. The Supreme Court concluded that, because no evidence was presented that contradicted the State's witness, the trial court's omission did not constitute reversible error. *See id.* at 686, 268 S.E.2d at 457.

In a recent unpublished decision where the trial court failed to make findings of fact, we concluded the "record contain[ed] a material conflict in the evidence such that we [could not] presume facts to support the trial court's ruling." *In re J.B.*, No. COA06-662, 2007 N.C. App. LEXIS 1015, at *12 (N.C. Ct. App. May 15, 2007) (unpublished). That case involved testimony both by the interrogating officer and the juvenile. *Id.* at *11-12. Here, only Deputy Holloway testified, and there was not a material conflict in his testimony. Therefore, we assume the trial court found Deputy Holloway's testimony to be credible and utilized the entirety of the testimony as the factual basis for its decision. Oliver has not argued we should remand for findings of fact, nor has he challenged Deputy Holloway's account of the incident on appeal. Although the trial court should have made specific findings of fact, we decline to remand this case in order for it to do so.

B. The Denial of Oliver's Motion to Suppress

In order to protect the Fifth Amendment right against compelled self-incrimination, suspects, including juveniles, are entitled to the warnings set forth in *Miranda v. Arizona* prior to police questioning. 384 U.S. 436, 478-79, 16 L. Ed. 2d 694, 726 (1966). The North Carolina Juvenile Code provides additional protection for juveniles. Juveniles who are "in custody" must be advised of the following before questioning begins:

- (1) That the juvenile has a right to remain silent;
- (2) That any statement the juvenile does make can be and may be used against the juvenile;
- (3) That the juvenile has a right to have a parent, guardian, or custodian present during questioning; and

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- (4) That the juvenile has a right to consult with an attorney and that one will be appointed for the juvenile if the juvenile is not represented and wants representation.

N.C. Gen. Stat. § 7B-2101(a)(1)-(4) (2009). If a juvenile is younger than fourteen, the Juvenile Code provides additional protection:

When the juvenile is less than 14 years of age, no in-custody admission or confession resulting from interrogation may be admitted into evidence unless the confession or admission was made in the presence of the juvenile's parent, guardian, custodian, or attorney. If an attorney is not present, the parent, guardian, or custodian as well as the juvenile must be advised of the juvenile's rights as set out in subsection (a) of this section; however, a parent, guardian, or custodian may not waive any right on behalf of the juvenile.

N.C. Gen. Stat. § 7B-2101(b) (2009). Previous decisions by our appellate division indicate the general *Miranda* custodial interrogation framework is applicable to section 7B-2101. *See, e.g., In re W.R.*, 363 N.C. 244, 247, 675 S.E.2d 342, 344 (2009) (applying *Miranda* case law to section 7B-2101).

Custodial interrogation is “‘questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any *significant way*.’” *State v. Buchanan*, 353 N.C. 332, 337, 543 S.E.2d 823, 826 (2001) (quoting *Miranda*, 384 U.S. at 444, 16 L. Ed. 2d at 706). This involves two elements: custody and interrogation. An objective totality of the circumstances test is used to determine whether a suspect has been taken into custody. *See Stansbury v. California*, 511 U.S. 318, 322-23, 128 L. Ed. 2d 293, 298-99 (1994) (per curiam). “[A]n officer’s subjective and undisclosed view” is irrelevant when determining if a suspect was in police custody. *Id.* at 319, 128 L. Ed. 2d at 296. Rather, the essential inquiry is “whether a reasonable person in the position of the defendant would believe himself to be in custody or that he had been deprived of his freedom of action in some significant way.” *Greene*, 332 N.C. at 577, 422 S.E.2d at 737. The interrogation element is also determined objectively; it refers to words or conduct the police “*should have known* are reasonably likely to elicit an incriminating response.” *Rhode Island v. Innis*, 446 U.S. 291, 301, 64 L. Ed. 2d 297, 308 (1980).

The Fifth Amendment is concerned solely with governmental coercion, *Colorado v. Connelly*, 479 U.S. 157, 170, 93 L. Ed. 2d 473, 486

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(1986), but *Miranda* does not automatically apply to *all* government actors. Rather, custodial interrogation refers to interrogation conducted by law enforcement. *E.g.*, *State v. Thomas*, 284 N.C. 212, 216, 200 S.E.2d 3, 7 (1973) (citing *Miranda*, 384 U.S. at 444, 16 L. Ed. 2d at 706). Statements made to “private individuals *unconnected* with law enforcement are admissible” if made freely and voluntarily. *State v. Etheridge*, 319 N.C. 34, 43, 352 S.E.2d 673, 679 (1987) (emphasis added). There are numerous decisions that have found government officials or individuals in “ostensible position[s] of authority” to be unconnected to law enforcement. *See, e.g., id.* (drawing on numerous cases to support this proposition). For instance, our Supreme Court has held medical personnel did not function as agents of law enforcement “where the accused made incriminating statements on his own initiative, out of the presence of police, and in response to questions not supplied by police.” *Id.* at 44, 352 S.E.2d at 679 (citing *State v. Alston*, 295 N.C. 629, 633, 247 S.E.2d 898, 900-01 (1978); *State v. Cooper*, 286 N.C. 549, 566-67, 213 S.E.2d 305, 317 (1975)).

The schoolhouse presents a unique environment for the purpose of applying the custodial interrogation analysis. Our courts have recognized that schoolchildren inherently shed some of their freedom of action when they enter the schoolhouse door. *See In re J.D.B.*, 363 N.C. 664, 669, 686 S.E.2d 135, 138 (2009). Of course, “the need to control the school environment and the school[s] . . . position *in loco parentis*” justifies the enhanced power of school authorities to regulate students’ conduct. *Craig v. Buncombe Cnty. Bd. of Educ.*, 80 N.C. App. 683, 686, 343 S.E.2d 222, 224 (1986) (citing *Coggins v. Bd. of Educ.*, 223 N.C. 763, 768-69, 28 S.E.2d 527, 531 (1944)). Therefore, a student is not in custody unless he is subjected to additional restraints beyond those generally imposed during school. *In re J.D.B.*, 363 N.C. at 669, 686 S.E.2d at 138 (citations omitted).

But we cannot forget that police interrogation is inherently coercive—particularly for young people. *See generally* John Douard, Note, *The Inherently Coercive Nature of Police Interrogation*, 3 Rutgers Race & L. Rev. 297 (2001); Cara A. Gardner, Recent Development, *Failing to Serve and Protect: A Proposal for an Amendment to a Juvenile’s Right to a Parent, Guardian, or Custodian during a Police Interrogation After State v. Oglesby*, 86 N.C. L. Rev. 1685, 1698-1702 (2008) (drawing on numerous studies to explain why juveniles are uniquely vulnerable to police interrogation). And despite the decreased level of freedom in schools, we cannot ignore the policy objectives behind section 7B-2101, which demand we protect our young people

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from overreaching law enforcement tactics. Thus, “[t]he [S]tate has a *greater* duty to protect the rights of a respondent in a juvenile proceeding than in a criminal prosecution.” *State v. Fincher*, 309 N.C. 1, 24, 305 S.E.2d 685, 699 (1983) (Harry Martin, J., concurring in result) (citing *In re Meyers*, 25 N.C. App. 555, 558, 214 S.E.2d 268, 270 (1975) (stating that in a juvenile proceeding, unlike an ordinary criminal proceeding, the burden upon the State to see that a juvenile’s rights are protected is increased rather than decreased)).

There appears to be a split of authority on the question of whether age and experience are relevant to our inquiry. See *In re J.D.B.*, 363 N.C. at 674, 686 S.E.2d at 141 (Brady, J., dissenting) (explaining the conflict created by the *In re J.D.B.* decision). In *In re J.D.B.*, a school interrogation decision involving a thirteen-year-old, our Supreme Court declined to consider age and academic standing as part of the analysis. *Id.* at 672, 686 S.E.2d at 140 (majority opinion).² But in *State v. Smith*, a juvenile case involving a sixteen-year-old that was decided outside the context of in-school interrogation, the Supreme Court explicitly indicated it considered “age and experience.” 317 N.C. 100, 105, 343 S.E.2d 518, 520 (1986), *overruled in part on other grounds by Buchanan*, 353 N.C. at 340, 543 S.E.2d at 828. Because *In re J.D.B.* is the more recent decision and deals with in-school interrogation, we conclude it controls here; thus, we do not account for Oliver’s age as part of our custodial interrogation inquiry.

Based on our review of the totality of the circumstances in light of the case law discussed above, we conclude Oliver’s statements were

2. The *In re J.D.B.* Court arrived at its conclusion based on *Yarborough v. Alvarado*, a United States Supreme Court decision reviewing the denial of a writ of *habeas corpus*. See *In re J.D.B.*, 363 N.C. at 672, 686 S.E.2d at 140 (citing *Yarborough v. Alvarado*, 541 U.S. 652, 668, 158 L. Ed. 2d 938, 954 (2004)). *Yarborough* suggests a suspect’s age and experience are irrelevant to *Miranda*’s custodial interrogation analysis. See 541 U.S. at 666, 158 L. Ed. 2d at 953-54 (2004). The United States Supreme Court held the failure to take a defendant’s age into account when performing this analysis was not an *unreasonable* application of clearly established law (the test used to rule on an application for a writ of *habeas corpus* under 28 U.S.C. § 2254(d)(1) (2006)). *Yarborough*, 541 U.S. at 668, 158 L. Ed. at 954. Considering a suspect’s age and experience injects a level of subjectivity that muddies the “clarity” for which the *Miranda* decision strived, the Court reasoned. See *id.* at 666-68, 158 L. Ed. 2d at 953-54. In *dicta*, the Court also stated that under the non-deferential *de novo* standard of review, it would have found consideration of age and experience improper. *Id.* at 668-69, 158 L. Ed. 2d at 954. In *In re J.D.B.*, our Supreme Court noted it was not bound by *Yarborough* because it was a *habeas corpus* decision, but nevertheless considered it persuasive. 363 N.C. at 672 n.1, 686 S.E.2d at 140 n.1. Compare *State v. Smith*, 317 N.C. 100, 106, 343 S.E.2d 518, 521 (1986) (stating Fifth and Sixth Amendment case law did not control decisions related to section 7A-595, which was recodified as section 7B-2101).

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made during custodial interrogation. As to whether he was in custody, Oliver was treated in such a way that a reasonable person in his situation would believe he was functionally under arrest. Oliver knew he was suspected of a crime and was interrogated for about six hours, generally in the presence of an armed police officer. He was frisked by that officer and transported in the officer's vehicle to Principal Livengood's office where he remained alone with Deputy Holloway until the principal arrived. Being frisked and transported in a police cruiser is not one of the usual restraints "generally imposed during school;" rather, it is more likely experienced by an arrestee, and a reasonable person is likely to associate it with the experience of being under arrest. There were times when Deputy Holloway left the office, or when Oliver was outside the office when the deputy was not with him, but at no point was there any indication he was free to leave. The deputy remained close by for most of the day. After being accused of drug possession, frisked, transported in a police cruiser, and interrogated nearly continuously from 9:00 a.m. to 3:00 p.m. with a police officer in the room for much of that interrogation, it was objectively reasonable for Oliver to believe he was functionally under arrest.

With respect to the interrogation element, this is a unique situation because Deputy Holloway did not ask any questions. We conclude, however, that under these circumstances, Deputy Holloway's conduct significantly increased the likelihood Oliver would produce an incriminating response to the principal's questioning. His near-constant supervision of Oliver's interrogation and "active listening" could cause a reasonable person to believe Principal Livengood was interrogating him in concert with Deputy Holloway or that the person would endure harsher *criminal* punishment for failing to answer.

The State makes several arguments in support of its position that Oliver was not subjected to custodial interrogation. We find them unpersuasive. The State first contends the length of the interrogation was due to Oliver changing his story several times. It is unclear how this fact changes the custodial calculus. If a juvenile is interrogated while in custody, conduct that gives law enforcement reason to *continue* the custodial interrogation does not justify the failure to give the appropriate constitutional or statutory warnings.

The State also argues *In re W.R.* controls. That decision, however, is clearly distinguishable for two reasons. First, the Supreme Court was engaged in plain error review since the juvenile did not make a motion to suppress or object at trial. *In re W.R.*, 363 N.C. at 247, 675 S.E.2d at

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344. Second, review was hindered because of the lack of a suppression hearing; the Court stated that based on the “limited record,” it could not conclude the resource officer’s conduct rendered the questioning “custodial interrogation.” *Id.* at 248, 675 S.E.2d at 344. In this case, we have the benefit of the transcript of the suppression hearing and are engaged in *de novo* review.

The State further contends this case presents a similar scenario to *In re J.D.B.*, and therefore, we should reach the same result. There, the juvenile explicitly *consented* to questioning after being *asked* to answer questions about recent neighborhood break-ins. *In re J.D.B.*, 363 N.C. at 670, 686 S.E.2d at 139. The Court concluded that, by asking the juvenile to answer questions, the investigator indicated to the juvenile he was not required to answer them. *Id.* Thus, the juvenile was not in custody when he was interrogated. *See id.* Here, on the other hand, nothing indicates Oliver was given *the option* of answering questions. At no time was he free to leave, and there is no suggestion anything transpired that would cause him to believe he was free to leave. These facts are critical to the custody inquiry and suggest Oliver incriminated himself under the functional equivalent of arrest. *Cf. In re Hodge*, 153 N.C. App. 102, 108-09, 568 S.E.2d 878, 882 (2002) (concluding juvenile was not in custody when investigator informed juvenile he would not be arrested and did not have to answer any questions).

The State also argues Deputy Holloway’s presence was justified by the need for security. We certainly sympathize with the State’s concern for the safety of school personnel; under these facts, however, the State’s argument is tenuous. First, the officer had already frisked Oliver for weapons and found none. And second, the officer left the room several times during the interrogation, suggesting safety was not a concern for Deputy Holloway or Principal Livengood. We also note that, if there was a legitimate concern over Oliver possessing a weapon, safety could have been ensured and interrogation could have been legally performed if the officer had given the appropriate warnings and abided by the requirements of section 7B-2101.

Because Oliver made his confession in the course of custodial interrogation without being afforded the warnings required by *Miranda* and section 7B-2101(a), and because he was not apprised of and afforded his right to have a parent present, we hold Oliver’s constitutional and statutory rights were violated. Accordingly, we hold the trial court erred in denying his motion to suppress.

[] A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when

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there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant. . . .

[] A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.

N.C. Gen. Stat. § 15A-1443(a)-(b) (2009). Assuming Oliver had not entered the admission, the State could have offered circumstantial evidence against him, and perhaps the testimony of Charlie and Bill. But Oliver's confession that the marijuana was his and that he had marijuana on his person is clearly the strongest evidence against him. We hold the violation of Oliver's statutory rights was prejudicial error and that the State has failed to establish the constitutional violation was harmless.

IV. Conclusion

For the foregoing reasons, we reverse the denial of Oliver's motion to suppress, vacate the trial court's order adjudicating Oliver a delinquent and entering a level 1 disposition, and remand to the trial court for further proceedings.

Reversed, vacated, and remanded.

Judges STEELMAN and STEPHENS concur.

STATE OF NORTH CAROLINA v. ELLJAH OMAR NABORS

No. COA10-176

(Filed 19 October 2010)

Drugs— possession of cocaine—sale of cocaine—insufficient evidence that substance was cocaine—lay opinion testimony

The trial court erred in denying defendant's motion to dismiss the charges of possession with intent to sell and deliver cocaine and sale of cocaine where the sole evidence that the substance that formed the basis of the charges was cocaine consisted of lay

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opinion testimony from the charging police officer and an undercover informant based on their visual observation of the substance. Because the evidence required to establish that the substance at issue was in fact a controlled substance must have been expert witness testimony based on a scientifically valid chemical analysis and not mere visual inspection, the evidence was insufficient to establish that the substance at issue was cocaine.

Appeal by Defendant from judgment entered 25 August 2009 by Judge W. Russell Duke, Jr. in Harnett County Superior Court. Heard in the Court of Appeals 2 September 2010.

Attorney General Roy Cooper, by Assistant Attorney General Amy Bircher, for the State.

Jesse W. Jones for Defendant.

STEPHENS, Judge.

The dispositive issue in this case is whether the trial court erred in denying Defendant's motion to dismiss the charges of possession with intent to sell and deliver cocaine and sale of cocaine when the sole evidence that the substance that formed the basis of the charges was cocaine consisted of lay opinion testimony from the charging police officer and an undercover informant based on their visual observation of the substance. Because the evidence required to establish that the substance at issue was in fact a controlled substance must have been expert witness testimony "based on a scientifically valid chemical analysis and not mere visual inspection[.]" *State v. Ward*, 364 N.C. 133, 142, 694 S.E.2d 738, 744 (2010), the evidence was insufficient to establish that the substance at issue was cocaine. Accordingly, the trial court erred in denying Defendant's motion to dismiss the charges. We thus vacate Defendant's convictions.

I. Procedural History

On 23 May 2008, Defendant Elijah Omar Nabors was charged with one count of possession with intent to sell and deliver cocaine and one count of sale of cocaine. On 9 March 2009, Defendant was indicted on both counts as well as having attained habitual felon status. Defendant was tried before a jury on 24 and 25 April 2009. The jury returned verdicts finding Defendant guilty of the cocaine charges, and Defendant pled guilty to having attained habitual felon status. Defendant was sentenced to a term of 96 to 125 months in prison. Defendant appeals.

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II. Factual Background

The State's evidence tended to show the following: On 22 May 2008, Officer Joseph Byrd of the Narcotics Division of the City of Dunn Police Department charged Christopher Gendreau with possession of cocaine. After being charged, Mr. Gendreau offered to act as an informant for the Dunn Police Department to "help himself out" with the charges.

On 23 May 2008, Mr. Gendreau set up an undercover purchase of cocaine by calling Defendant on the telephone and telling him that Mr. Gendreau needed to buy some cocaine from Defendant. Mr. Gendreau and Defendant agreed to meet at the Liberty gas station in Dunn. Officer Byrd positioned himself in the parking lot across the street from the Liberty gas station and observed Defendant's vehicle pull into the Liberty parking lot. Mr. Gendreau approached the passenger side of Defendant's car. Defendant told Mr. Gendreau that the cocaine was on the passenger door. Mr. Gendreau retrieved the alleged cocaine from the armrest of the passenger door and handed Defendant \$80 in marked 20-dollar bills.

Mr. Gendreau then gave the agreed-upon signal—removing his hat and scratching his head—to indicate to Officer Byrd that the purchase had been made. Officer Byrd called his supervisor, Lieutenant Jimmy Page, and Sergeant Dallas Autrey. Mr. Gendreau walked to the designated meeting location and turned the substance over to Sergeant Autry. Lieutenant Page stopped Defendant's car. Defendant was driving and Quinton Smith was in the passenger seat. Lieutenant Page retrieved the \$80 in marked bills from Defendant and showed Defendant a photocopy of the money to confirm with Defendant that the money was from the Dunn Police Department.

At trial, Officer Byrd identified the substance purchased by Mr. Gendreau, State's Exhibit 2, as crack cocaine. Mr. Gendreau testified that Defendant sold him "cocaine" in the Liberty gas station parking lot. Officer Byrd acknowledged that the substance had been analyzed by the North Carolina State Bureau of Investigation ("SBI") for proper identification and weight. However, the analyst who performed the analysis did not testify at trial.

Defendant called Quinton Smith to testify on Defendant's behalf. Mr. Smith testified that he, not Defendant, sold Mr. Gendreau cocaine at the Liberty gas station. On cross-examination, the State questioned Mr. Smith about his prior written statement which indicated that Defendant had sold cocaine to Mr. Gendreau.

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III. Discussion

By Defendant's third argument, Defendant contends that the trial court erred by failing to dismiss the charges of possession with intent to sell and deliver cocaine and sale of cocaine for insufficient evidence that the substance Defendant sold to Mr. Gendreau was cocaine. We agree.

In a criminal case, the State must prove every element of a criminal offense beyond a reasonable doubt. *State v. Billinger*, 9 N.C. App. 573, 575, 176 S.E.2d 901, 903 (1970). Thus, in a controlled-substance case, "[t]he burden is on the State to establish the identity of any alleged controlled substance that is the basis of the prosecution." *Ward*, 364 N.C. at 147, 694 S.E.2d at 747. When a defendant challenges the sufficiency of the evidence, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Dorton*, 172 N.C. App. 759, 770, 617 S.E.2d 97, 105 (citations and quotation marks omitted), *disc. review denied*, 360 N.C. 69, 623 S.E.2d 775 (2005).

In *State v. Freeman*, 185 N.C. App. 408, 648 S.E.2d 876 (2007), *appeal dismissed*, 362 N.C. 178, 657 S.E.2d 663, *petition for cert. dismissed*, — N.C. —, 663 S.E.2d 429 (2008), defendant challenged the admission of lay opinion testimony from a police officer that the substance that formed the basis of the charge of possession of cocaine was crack cocaine. Police arrested defendant, an armed robbery suspect, who had in his possession what "looked like a pill bottle." *Id.* at 411, 648 S.E.2d at 879. The officer testified that "two of the pills in the pill bottle . . . were crack cocaine[.]" *Id.* at 414, 648 S.E.2d at 882. The officer's identification of the pills as crack cocaine was based solely upon the officer's visual examination of the pills and his "extensive training and experience in the field of narcotics." *Id.*¹ The two pills were tested by the Charlotte-Mecklenburg Police Crime Laboratory and the analyst who conducted the chemical analysis testified that the substances were cocaine, having a combined weight of .22 grams. *Id.* at 411, 416, 648 S.E.2d at 880, 882.

Defendant argued on appeal that the trial court committed plain error by allowing the officer to testify that the two pills seized were crack cocaine. *Id.* at 414, 648 S.E.2d at 881. In light of the analyst's tes-

1. The officer testified that he had been with the police department for eight years at the time and had come into contact with crack cocaine between 500 and 1000 times. *Id.*

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timony confirming through a chemical analysis that the substance was cocaine, the admission of the officer's statement was clearly not plain error. However, this Court went on to hold that it was permissible under Rule 701 of the North Carolina Rules of Evidence for the officer to render an opinion that the substance was crack cocaine. *Id.* at 414-15, 648 S.E.2d at 882.²

In *State v. Llamas-Hernandez*, 189 N.C. App. 640, 659 S.E.2d 79 (2008) (Steelman, J., concurring in part and dissenting in part), *rev'd and dissent adopted*, 363 N.C. 8, 673 S.E.2d 658 (2009), defendant challenged the admission of lay opinion testimony from two detectives that the substance which formed the basis of the prosecution was powder cocaine. A divided panel of this Court upheld the trial court's decision in reliance on *Freeman*. *Llamas-Hernandez*, 189 N.C. App. 640, 659 S.E.2d 79. However, after admitting that "the holding in *Freeman* concerns us[.]" the majority felt "bound to follow it." *Id.* at 647, 659 S.E.2d at 83. Judge Steelman dissented in part, noting that "[t]he appearance of the cocaine in *Freeman* simply was not a major concern in the case because the laboratory report conclusively established the chemical composition of the substance." *Id.* at 654, 659 S.E.2d at 87 (Steelman, J., dissenting). Judge Steelman distinguished *Freeman* on the basis that unlike powder cocaine, crack cocaine "has a distinctive color, texture, and appearance." *Id.* Thus, Judge Steelman opined that "[w]hile it *might* be permissible, based upon these characteristics, for an officer to render a lay opinion as to crack cocaine, it cannot be permissible to render such an opinion as to a non-descript white powder." *Id.*

The dissent further noted that the General Assembly had adopted "a technical, scientific definition of cocaine[.]" *Id.* at 652, 659 S.E.2d at 86. By doing so, "it is clear that the General Assembly intended that expert testimony be required to establish that a substance is in fact a controlled substance." *Id.* Judge Steelman further reasoned that, given the technical definition of a controlled substance and the existence of

2. In so holding, this Court relied solely on *State v. Bunch*, 104 N.C. App. 106, 408 S.E.2d 191 (1991). *Bunch* held that an officer, based upon his experience, can testify as to common practices of drug dealers. *Id.* at 110, 408 S.E.2d at 194. The testimony dealt with the practice that one person in a drug deal holds the money, and another holds the drugs. *Id.* This testimony dealing with custom and practice in drug deals is not the same as an officer testifying as to the chemical composition of a purported controlled substance under Chapter 90 of the General Statutes. In light of our Supreme Court's holding in *State v. Ward*, *supra*, we believe that *Bunch* in no way supports the holding of *Freeman* that an officer can give a lay opinion that a substance is cocaine. Furthermore, in light of *State v. Ward*, the continued viability of the *State v. Freeman* holding is in doubt.

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statutory procedures for the admission of laboratory reports and the discovery of both those reports and underlying materials, the General Assembly never “intended . . . that an officer could make a visual identification of a controlled substance[.]” *Id.* at 653, 659 S.E.2d at 87. Our Supreme Court reversed this Court’s decision in *Llamas-Hernandez* and adopted Judge Steelman’s dissent without further comment. *Llamas-Hernandez*, 363 N.C. 8, 673 S.E.2d 658.

Recently in *Ward*, our Supreme Court held that an expert witness’s visual identification of an alleged controlled substance “is not sufficiently reliable for criminal prosecutions” and thus, “[u]nless the State establishes before the trial court that another method of identification is sufficient to establish the identity of the controlled substance beyond a reasonable doubt, some form of scientifically valid chemical analysis is required.” *Ward*, 364 N.C. at 147, 694 S.E.2d at 747 (emphasis added).

In *Ward*, the State presented expert witness testimony that pills found on defendant’s person, in his vehicle, and at his residence were pharmaceuticals classified as controlled substances under the North Carolina Controlled Substances Act. *Id.* at 134, 694 S.E.2d at 739. Special Agent Irvin Lee Allcox, a chemist in the Drug Chemistry Section of the SBI crime laboratory who had worked more than 34 years for the SBI, including the most recent 24 years as a chemist in the SBI crime laboratory, was qualified and testified as an expert in the chemical analysis of drugs and forensic chemistry.³ Special Agent Allcox testified that of the sixteen collections of pills the SBI received for examination in the case, he conducted a chemical analysis on “ ‘about half of them.’ ” *Id.* at 136, 694 S.E.2d at 740. “The remaining tablets were identified solely by visual inspection and comparison with information provided by Micromedex literature, which Special Agent Allcox described as a ‘medical publication that is used by the doctors in hospitals and pharmacies to identify prescription medicine.’ ” *Id.* (footnote omitted). Special Agent Allcox further testified that “through ‘a listing of all the pharmaceutical markings,’ Micromedex can help ‘identify the contents, the manufacturer and the type of substances in the tablets.’ ” *Id.* at 136-37, 694 S.E.2d at 740.

3. Our Supreme Court specifically noted, “Special Agent Allcox’s credentials are not disputed; he appears to be eminently qualified as an expert witness in forensic chemistry. He has worked over thirty-four years with the SBI, including twenty-four years as a forensic chemist, and he handles pharmaceuticals on nearly a daily basis. The prosecutor at trial referred to him as ‘supremely qualified.’ ” *Id.* at 145, 694 S.E.2d at 746.

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The trial court admitted Special Agent Allcox's testimony regarding the substances on which he conducted a chemical analysis. Furthermore, over defendant's objections, the trial court also admitted Special Agent Allcox's testimony regarding the substances which he identified merely by visual inspection and reference to the Micromedex literature. In affirming this Court's opinion,⁴ the Supreme Court stated that "[t]he natural next step following our decision to adopt the reasoning of the dissenting judge in *Llamas-Hernandez* is to conclude here that the expert witness testimony required to establish that the substances introduced here are in fact controlled substances must be based on a scientifically valid chemical analysis and not mere visual inspection." *Ward*, 364 N.C. at 142, 694 S.E.2d at 744. The Court thus concluded that "the trial court abused its discretion by permitting Special Agent Allcox to identify certain evidence as controlled substances based merely on visual inspection as a method of proof." *Id.* at 148, 694 S.E.2d at 747-48.

The Court found support for its holding in (1) the precedent set by *Llamas-Hernandez*,⁵ (2) enactments of the General Assembly prohibiting the manufacture, sale, delivery, or possession of controlled substances, "provide very technical and 'specific chemical designation[s]'" for controlled substances, and also prohibit the creation, sale, delivery, or possession of counterfeit controlled substances, *id.* at 143, 694 S.E.2d at 744; and (3) Special Agent Allcox's own testimony which was "lacking in sufficient credible indicators to support the reliability of his visual inspection methodology." *Id.* at 144, 694 S.E.2d at 745.

In this case, Officer Byrd testified that he had been a sworn law enforcement officer for "[a]pproximately three years" and had received specialized training in narcotics investigation consisting of a "basic narcotic investigation class [which] include[d] investigations of packaging,

4. This Court held that "the trial court erred . . . by admitting testimony by Special Agent Allcox identifying certain items as controlled substances on the basis of a visual identification process." *State v. Ward*, — N.C. App. —, —, 681 S.E.2d 354, 373 (2009).

5. The Court also noted that although not binding precedent, other jurisdictions have reached similar conclusions. *Id.* at 142 n.4, 694 S.E.2d at 744 n.4 (citing *People v. Mocaby*, 882 N.E.2d 1162, 1167 (Ill. App. Ct. 5th Dist. 2008) (holding that expert witness testimony identifying tablets as containing controlled substances based on comparing them "to pictures in a book" amounted to "conjecture" and "speculat[ion]" and was not a "conclusive scientific analysis" on which the prosecution could rely to carry its burden of proof); *State v. Colquitt*, 137 P.3d 892, 894 (Wash. Ct. App. 2006) (overturning a conviction when the prosecutor offered as evidence that a law enforcement officer believed the substance at issue was cocaine and conducted a field test that was never verified by further laboratory testing)).

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sale, and distribution of [controlled substance] products.” When asked by the prosecutor to identify State’s exhibit number 2, Officer Byrd responded, “It’s crack cocaine.”

Mr. Gendreau acknowledged that he had “personal experience with drug use” in that he used crack cocaine for “about two-and-a-half years, on and off” between “ ’07 and ’08.” When asked by the prosecutor what he received from Defendant, Mr. Gendreau testified, “[a] white, rock-like substance that I knew to be crack cocaine.” After Officer Byrd and Mr. Gendreau’s testimony, the jury recessed for afternoon break. The following exchange then took place between the prosecutor, Ms. Matthews, and the trial court:

MS. MATTHEWS: Your Honor, with regard to scheduling, we have called the SBI. They are aware that things are proceeding faster than I initially expected. I’ve been told by my office that they need approximate[ly] two hours to get here today. I can call and confirm that, but that’s what I’ve been told by my office.

THE COURT: That’s too bad.

MS. MATTHEWS: I would ask for an opportunity to, hopefully, get them here.

THE COURT: Well, I told you at 1:30 they were supposed to be here.

MS. MATTHEWS: Well, that’s when they called. It’s just that I’m not sure that - - - -

THE COURT: Well, at 3:30, they should have been here.

MS. MATTHEWS: I would hope so, but I’m not a hundred percent sure that that’s the case.

THE COURT: Well, your controlled substance is already in and has been identified as crack cocaine without objection. So I’m not going to wait two hours. You can call them and tell them that.

MS. MATTHEWS: That’s fine.

The State ultimately rested its case without calling the SBI analyst to the witness stand.

Neither Officer Byrd nor Mr. Gendreau was qualified or testified as an expert in the chemical analysis of drugs, forensic chemistry, or another related field. Accordingly, their opinion testimony as to the identity of the substance at issue was insufficient to establish that the

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substance introduced here was in fact a controlled substance. *See id.* at 142, 694 S.E.2d at 744. (“[T]he expert witness testimony required to establish that the substances introduced here are in fact controlled substances must be based on a scientifically valid chemical analysis and not mere visual inspection.”); *Llamas Hernandez*, 189 N.C. App. at 652, 659 S.E.2d at 86 (Steelman, J., dissenting) (“By enacting such a technical, scientific definition of cocaine, . . . it is clear that the General Assembly intended that expert testimony be required to establish that a substance is in fact a controlled substance.”).

Furthermore, neither Officer Byrd’s nor Mr. Gendreau’s testimony was “based on a scientifically valid chemical analysis and not mere visual inspection.” *Ward*, 364 N.C. at 142, 694 S.E.2d at 744. There is no indication that Officer Byrd or Mr. Gendreau did anything more than engage in conjecture that the substance purchased from Defendant was cocaine based on their previous encounters with cocaine and their visual observation of the substance in this case.

While *Llamas-Hernandez* contemplated that “it *might* be permissible” for an officer to *render* a lay opinion as to whether a substance is crack cocaine based on crack cocaine’s “distinctive color, texture, and appearance[.]” *Llamas-Hernandez*, 189 N.C. App. at 654, 659 S.E.2d at 87 (Steelman, J., dissenting), mere lay opinion that a substance is a controlled substance based solely on its physical appearance is insufficient evidence from which a jury could find beyond a reasonable doubt that the substance is, in fact, controlled.

Indeed, as noted in *Ward*, the legislature has acknowledged the existence of counterfeit controlled substances by imposing liability for actions related to counterfeit controlled substances, *see* N.C. Gen. Stat. § 90-95(a)(2) (2009) (making it unlawful to “create, sell or deliver, or possess with intent to sell or deliver, a counterfeit controlled substance”), and has clearly contemplated that the physical appearance of a counterfeit controlled substance would be “substantially identical to a specified controlled substance.” N.C. Gen. Stat. § 90-87(6)(b)(3) (2009) (statutory definition of counterfeit controlled substance which designates three factors that collectively indicate evidence of an intent to misrepresent a controlled substance).

Moreover, “by providing ‘procedures for the admissibility of [] laboratory reports’ and ‘enacting such a technical, scientific definition of cocaine, it is clear that the General Assembly intended that expert testimony be required to establish that a substance is in fact a controlled substance.’” *Ward*, 364 N.C. at 142, 694 S.E.2d at 744 (quoting

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Llamas-Hernandez, 189 N.C. App. at 652, 659 S.E.2d at 86-87 (Steelman, J., dissenting) (citations omitted). “ [I]f it was intended by the General Assembly that an officer could make a visual identification of a controlled substance, then such provisions in the statutes would be unnecessary.’ ” *Id.* (quoting *Llamas-Hernandez*, 189 N.C. App. at 653, 659 S.E.2d at 87 (Steelman, J., dissenting)).

As Special Agent Allcox’s method of visual inspection of the pills and comparison of their physical appearance with information provided by Micromedex literature was insufficiently reliable under N.C. Gen. Stat. § 8C-1, Rule 702 to support Special Agent Allcox’s expert opinion as to the identity of the substances at issue in *Ward*, Officer Byrd’s and Mr. Gendreau’s conjecture based on their previous encounters with cocaine and their observation of the substance here was surely not the “scientifically valid chemical analysis” of the substance required “to establish the identity of the controlled substance beyond a reasonable doubt[.]” *Id.* at 147, 694 S.E.2d at 747.

Accordingly, there was insufficient evidence that the substance that formed the basis of the controlled substance charges in this case was cocaine, and the trial court thus erred in denying Defendant’s motion to dismiss those charges. Defendant’s convictions on those charges are vacated. As a result, Defendant’s conviction as an habitual felon is also vacated. *See State v. Smith*, 186 N.C. App. 57, 67, 650 S.E.2d 29, 36 (2007) (vacating judgment under which defendant was sentenced as a habitual felon because new trial ordered as to defendant’s underlying felony charge); *see also State v. Allen*, 292 N.C. 431, 433-34, 233 S.E.2d 585, 587 (1977) (“[T]he proceeding by which the state seeks to establish that defendant is an habitual felon is necessarily ancillary to a pending prosecution for the ‘principal,’ or substantive, felony.”).

In light of our conclusions, we need not address Defendant’s remaining assignments of error.

VACATED.

Judges ELMORE and JACKSON concur.

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[207 N.C. App. 473 (2010)]

STATE OF NORTH CAROLINA v. JOHN FRANCIS DYE, DEFENDANT

No. COA09-1574

(Filed 19 October 2010)

1. Appeal and Error— preservation of issues—failure to make motion to strike testimony

Although defendant contended that the trial court erred in a statutory rape, second-degree rape, and incest case by allowing a pediatrician to testify as to her opinion of the minor victim's truthfulness, this argument was not preserved. Even assuming defendant properly objected to the testimony he did not make a motion to strike. Further, defendant failed to object to the State repeating the question or the answer.

2. Evidence— expert testimony—sexual abuse of child—secondary gain—no prejudicial error

The trial court did not commit plain error in a statutory rape, second-degree rape, and incest case by permitting a pediatrician's testimony regarding secondary gain. Even assuming *arguendo* that the testimony was erroneously admitted and that it impermissibly bolstered the minor's testimony, the error did not arise to plain error given the overwhelming evidence of defendant's guilt.

3. Criminal Law— denial of motion for mistrial—victim outbursts during closing arguments

The trial court did not abuse its discretion by denying defendant's motion for a mistrial made after the jury's verdict in a statutory rape, second-degree rape, and incest case based on the victim's outbursts during defense counsel's closing arguments. The trial court took immediate action to respond to the outburst, eventually banned the victim from the courtroom, and provided defendant with an opportunity to make any motions or request further instructions during the trial.

Appeal by defendant from judgments entered on or about 28 April 2009 by Judge Orlando F. Hudson in Superior Court, Durham County. Heard in the Court of Appeals 12 May 2010.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Laura E. Crumpler, for the State.

Russell J. Hollers III, for defendant-appellant.

STROUD, Judge.

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[207 N.C. App. 473 (2010)]

Defendant was convicted by a jury of two counts of statutory rape, two counts of incest of a child, second degree rape, and incest. Defendant appeals, arguing the trial court erred by allowing certain testimony from an expert witness and in failing to grant defendant's motion for a mistrial. For the following reasons, we find no error.

I. Background

The State's evidence tended to show that in 1993 Ms. Jane Smith¹ and defendant began a romantic relationship; at the time Ms. Smith and defendant began dating, Ms. Smith's daughter, Mary, was four years old. In 1994, Ms. Smith and defendant moved in together. On 29 May 1999, Ms. Smith married defendant. In 2004, when Mary was fourteen years old, she wanted to join the marching band at her high school. Defendant told Mary she had to prove she deserved to be in band and then had sexual intercourse with her; Mary began crying and told defendant, "[T]his isn't right. You're my step-dad, you know, what are you doing." Over the course of 2004 and the next couple of years defendant forced Mary multiple times to have sexual intercourse, oral sex, and "anal penile sex." In September of 2006, Ms. Smith walked into her bedroom and saw defendant "on top of my daughter on the floor in my bedroom, having sex, penile to vaginal[.]"

On or about 19 February 2007, defendant was indicted for two counts of statutory rape, two counts of incest of a child, second degree rape, incest, and committing a crime against nature. After a jury trial, defendant was found guilty of two counts of statutory rape, two counts of incest of a child, second degree rape, and incest. Defendant appeals.

II. Dr. Narayan's Testimony

On appeal, two of defendant's issues focus on the testimony of Dr. Aditee Narayan, a pediatrician, "an assistant professor at Duke University in the Department of Pediatrics, . . . an Associate Medical Director for the Child Abuse Neglect Medical Evaluation Team, . . . [and an] Associate Program Director for the Duke Residency Training Program." During defendant's trial Dr. Narayan testified "as an expert in the area of general pediatrics, child behavior, diagnostic interviewing for purposes of a child medical evaluation, and the diagnosis and treatment of children suspected of being sexually abused." We will analyze defendant's two arguments separately.

[1] Defendant first argues that Dr. Narayan improperly testified as to her opinion of Mary's truthfulness. During direct examination by the

1. Pseudonyms will be used to protect the identity of the victim.

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State, Dr. Narayan was asked, “Based on your interview and your physical examination of [Mary], do you have an opinion as to whether your findings are consistent with the child’s history or disclosure of sexual assault?” The following dialogue then took place:

A Yes.

MR. CAMPBELL [defendant’s attorney]: Objection.

THE COURT: Overruled.

. . . .

Q What is your opinion?

MR. CAMPBELL: Objection.

THE COURT: Hold on. Mr. Deputy, if you’ll take the jury to the jury deliberation room.

(JURY LEAVES THE COURTROOM)

THE COURT: Outside the presence of the jury, Doctor, you can answer.

THE WITNESS: I believe that, based upon my medical evaluation, her presentation is consistent with the history that she provided.

THE COURT: Any other questions?

MS. PAUL: [State’s attorney] No.

THE COURT: Mr. Campbell?

MR. CAMPBELL: No. No argument.

THE COURT: Did you want to be heard?

MR. CAMPBELL: No, Judge.

THE COURT: All right.

MR. CAMPBELL: If that’s going to be the answer.

THE COURT: All right, that was the answer right now.

MR. CAMPBELL: I understand.

THE COURT: All right.

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(JURY RETURNS TO THE COURTROOM)

THE COURT: All right, your objection's overruled.

. . . .

Q Based on your examination and interview, do you have an opinion as to whether your findings are consistent with [Mary]'s history of sexual assault?

A I do have an opinion.

Q What do you base that opinion on?

A I base the opinion on her history, so the interview, her physical examination, a review of her records, I was able to form my opinion.

Q What is that opinion?

A My opinion is that, based on her presentation, her lengthy history, her physical examination, her behaviors, they're all consistent with the history that she provided of chronic sexual assault.

MR. CAMPBELL: Objection.

THE COURT: Overruled.

Thus, defendant's attorney objected to Dr. Narayan's testimony, then stated during *voir dire* that he did not want to be heard as to any specific basis for his objection and seemingly withdrew his objection, only to object again to the same testimony once the jury returned and examination resumed. Defendant's attorney did not state a basis for either of his two objections.

Defendant now contends that "the trial court erred in allowing the State's expert to give her opinion that [Mary] was truthful[.]" (Original in all caps.) Defendant argues that Dr. Narayan's testimony that "[m]y opinion is that, based on her presentation, her lengthy history, her physical examination, her behaviors, they're all consistent with the history of that she provided of chronic sexual assault" was "not based on anything other than Dr[.] Narayan's circular reasoning[.]" Even assuming defendant properly objected to this testimony after he failed to state a ground for his objection during *voir dire* and arguably even withdrew it, defendant has still failed to preserve this issue for appeal as he did not make a motion to strike the testimony. See *State v. Curry*, — N.C. App. —, —, 692 S.E.2d 129, 138-39 (2010) ("We first note that defendant's counsel objected after the witness had answered the question, and

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he failed to make a motion to strike; thus, defendant waived this objection. Furthermore, when the State repeated the question, defendant failed to object to either the question or the answer; this too would waive defendant's previous objection." (citation omitted); *State v. Burgin*, 313 N.C. 404, 409, 329 S.E.2d 653, 657 (1985) ("The one objection made was lodged after the witness responded to the question. Defendant made no motion to strike the answer, and therefore waived the objection." (citations omitted)).

[2] Defendant next argues that the trial court committed plain error in permitting Dr. Narayan's testimony regarding secondary gain, as this testimony was also effectively vouching for Mary's truthfulness. During the State's direct examination of Dr. Narayan, the following dialogue took place:

Q . . . Are you familiar with the concept of secondary gain?

A Yes.

Q If you would tell the jury what that is.

A Secondary gain is if you do something to get something else out of it. So if you—if you steal a cookie from the cookie jar in an effort to try to get attention from your mom because she's been so busy doing other things that she wasn't paying any attention to you, that would be secondary gain. When you do one act in order to get something else out of that.

Q It's interesting the analogy that you just used. You steal a cookie from the cookie jar, you do something naughty in order to get attention from your mother because your mother's too busy.

In [Mary]'s situation, did you have any opinion or thought on the issue of secondary gain?

A I did.

Q If you would just explain to the jury what you mean.

A So the presence of secondary gain is something we always consider when we're asked to do these medical evaluations for children. Sometimes children will say things and you have to think about, well, why are they saying it, is there something else going on.

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That's incredibly important because the recommendations that I would make for that child could be very different than the recommendations that I made for [Mary].

I thought that there actually was really very little secondary gain for [Mary]. She lost a great deal with this process, and I did not in my time with her feel that there was any secondary gain which she got out of this process.

She's not the one who disclosed anything, to begin with. Her mother walked in, and that's where everything started.

As to the preceding testimony, defendant argues that "the trial court plainly erred in allowing the State's expert to give her expert opinion that [Mary] was telling the truth." (Original in all caps.) Defendant contends that "the lack of a diagnostic physical finding means that the opinion only served to vouch for the witness's credibility. . . . The trial court erred in allowing Dr[.] Narayan to tell the jury that she had the expert 'feeling' that [Mary] was telling the truth."

As defendant did not object to the preceding testimony, he concedes that we will review it only for plain error.

Plain error is an error that is so fundamental as to result in a miscarriage of justice or denial of a fair trial. A defendant must demonstrate not only that there was error, but that absent the error, the jury probably would have reached a different result. Accordingly, defendant must show that absent the erroneous admission of the challenged evidence, the jury probably would not have reached its verdict of guilty.

State v. Cunningham, 188 N.C. App. 832, 835, 656 S.E.2d 697, 699-700 (2008) (citations and quotation marks omitted).

Defendant cites no case law to support his argument that testimony regarding "secondary gain" should be considered as testimony that "vouch[es] for the witness's credibility[.]" However, even assuming *arguendo* that the admission of Dr. Narayan's testimony was erroneously admitted and impermissibly bolstered Mary's testimony, we still do not conclude that this error rises to the level of plain error. *See id.*

In *State v. Boyd*, this Court stated,

[i]t is fundamental to a fair trial that the credibility of the witnesses be determined by the jury and thus an expert's opinion to the effect that a witness is credible, believable, or truthful is inadmissible. The admission of such an opinion is plain error when

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the State's case depends largely on the prosecuting witness's credibility. For example, in *State v. Holloway*, we found plain error in experts' opinions of a child's truthfulness when the child testified to sexual abuse not leaving physical injury, and the defendant testified to the contrary and presented evidence of a normal relationship with the child. In that case the child did not report the alleged incident until more than four weeks later and there was no suggestion of changed behavior, immediately after or subsequently.

Here, in contrast, beyond the victim's testimony, the State also presented evidence that the victim, upset and crying, called her grandmother to pick her up early, gave consistent statements to her mother, Officer Bowens, Department of Social Services staff, and Ms. Doshier [, the social worker], and exhibited changed behavior following the alleged incident. Defendant did not testify. This additional evidence was such that it is unlikely that the jury would have reached a different conclusion absent [the social worker's] testimony about consistency and plausibility.

— N.C. App. —, —, 682 S.E.2d 463, 468 (2009) (citations, quotation marks, ellipses, and brackets omitted), *disc. review denied*, — N.C. —, — 691 S.E.2d 414 (2010).

Here, beyond Mary's testimony, the evidence included Ms. Smith's testimony regarding defendant's abnormal relationship with both his biological daughter and Mary and her personal observation of defendant having "penile to vaginal" intercourse with Mary, as well as defendant's own statements that he had been sexually active with Mary for "two years" and that "he was a sick man." After Ms. Smith discovered defendant with Mary and removed defendant and his belongings from the house, defendant went to the Dominican Republic from where he later had to be extradited for purposes of prosecution. Just as in *Boyd*, "this additional evidence was such that it is unlikely that the jury would have reached a different conclusion absent [the expert's] testimony[.]" *Id.* Accordingly, both of defendant's arguments regarding Dr. Narayan's testimony are overruled.

III. Motion for Mistrial

[3] Lastly, defendant contends that "the trial court erred in denying Mr. Dye's motion for mistrial." (Original in all caps.) During defendant's attorney's closing argument, Mary interrupted at least twice. The first time Mary told defendant's counsel, "You shut up, how dare you say I'm unbelievable. I can't listen to this. Those were his words coming out of his mouth. How dare he torture me more. Why is he doing this to me?"

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The jury was sent out of the courtroom and the trial court informed the State's attorney that Mary would not be permitted to remain in the courtroom unless she was "under control." Mary apologized and agreed to "be quiet." The jury returned to the courtroom and Mr. Campbell resumed his closing argument only to once again be interrupted.

From the transcript it is not clear what caused the second interruption, but after the jury retired for deliberation the trial court described the entire incident as follows:

[T]he Court does recall that there were at least two outbursts by . . . [Mary] during Mr. Campbell's argument. The Court warned her twice that she would have to remain calm if we were to continue. When she did not remain calm, the Court asked that she be escorted from the courtroom, which she was.

Mr. Campbell was able to continue with his argument. Although counsel indicates she came back in the courtroom, the Court during its jury instructions did not see her come back in the courtroom. I was paying attention to the jury as I read the jury instructions. I did not see the jury disrupted by . . . [Mary], if she did return to the courtroom.

The Court does find that at least the two outbursts were intentional on . . . [Mary]'s behalf. The Court did note that she appeared to have some sort of asthmatic attack during the course of Mr. Campbell's argument. Although it was disruptive in that he could not continue, the Court did not find, does not find, that that was intentional on her part.

As I said earlier, I did not see . . . [Mary] come back in the courtroom as I was instructing the jury, and if she had some sort of attack, the Court did not notice it. I was watching the jury. I did not see that the jury was distracted by any attack in the court.

The trial court then asked Mr. Campbell, "Were you moving for a mistrial?" To which Mr. Campbell responded, "No, Judge, not at this time." The trial court then determined that because Mr. Campbell was not requesting a mistrial, it would not grant one *ex mero motu*. The jury continued deliberations and after the verdicts were read, Mr. Campbell moved for a mistrial which was subsequently denied.

We first note that it is problematic for defendant to directly state to the trial court that he did not want a mistrial and to fail to request any other remedial action by the trial court, only to request mistrial upon

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learning that the jury had found him guilty on all the charges, and to now base his argument on appeal on the denial of his belated request. Defendant argues before us that Mary's "conduct inside the courtroom resulted in substantial and irreparable prejudice to Mr. Dye's defense." However, according to defendant, the "substantial and irreparable prejudice" was not apparent until after the jury had found defendant guilty of all charges.

One of the purposes of requiring parties to object and make motions before the trial court is so that the trial court has the opportunity to correct any errors. *See Reep v. Beck*, 360 N.C. 34, 37, 619 S.E.2d 497, 499 (2005).

Rule 10(b)(1) provides, in part, that to preserve a question for appellate review, 'a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make.' N.C.R. App. P. 10(b)(1). We have observed that:

This subsection of Rule 10 is directed to matters which occur at trial and upon which the trial court must be given an opportunity to rule in order to preserve the question for appeal. The purpose of the rule is to require a party to call the court's attention to a matter upon which he or she wants a ruling before he or she can assign error to the matter on appeal.

Id. (citation, ellipses, and brackets omitted). The very purpose of Rule 10(b)(1) is disregarded by defendant's attempt to receive a favorable ruling only *after* the jury has returned with its verdicts, where the trial court had previously given him the opportunity to request mistrial or other remedial action.

Furthermore, a "[m]istrial is a drastic remedy, warranted only for such serious improprieties as would make it impossible to attain a fair and impartial verdict." *State v. Smith*, 320 N.C. 404, 418, 358 S.E.2d 329, 337 (1987) (citation and quotation marks omitted). The trial court "must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." N.C. Gen. Stat. § 15A-1061 (2003). However, "[n]ot every disruptive event which occurs during trial automatically requires the court to declare a mistrial." *State v. Allen*, 141 N.C. App. 610, 617, 541 S.E.2d 490, 496 (2000) (citation omitted), *disc. review denied and appeal dismissed*, 353 N.C. 382, 547 S.E.2d 816

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(2001). “Our standard of review when examining a trial court’s denial of a motion for mistrial is abuse of discretion.” *State v. Simmons*, 191 N.C. App. 224, 227, 662 S.E.2d 559, 561 (2008) (citation omitted).

Defendant focuses his argument here on the lack of a curative instruction, but as our Court stated in *Allen*,

defendant’s attorney made no request for a curative instruction or other remedial action. Our rule has long been that where a charge fully instructs the jury on substantive features of the case, defines and applies the law thereto, the trial court is not required to instruct on a subordinate feature of the case absent a special request. As the court noted in *Blackstock*, such an instruction may well have highlighted the witness’s emotional state; indeed it is possible that the defense attorney declined to request a curative instruction because of the likelihood it would emphasize the witness’s outburst.

Allen, 141 N.C. App. at 618, 541 S.E.2d at 496 (citations and quotation marks omitted).

Here, after Mary’s initial outburst, the trial court removed the jury from the courtroom and specifically instructed that Mary must remain quiet and Mary verbally agreed. After Mary’s second outburst, the trial court had Mary removed completely from the courtroom until after Mr. Campbell had finished his closing argument and provided defendant an opportunity to request any remedial measures, including mistrial. Defendant declined to make any requests until after the jury had returned its verdict. As the trial court took immediate action to respond to the outburst, eventually banned Mary from the courtroom, and provided defendant with an opportunity to make any motions or request further instructions, we conclude that the trial court did not abuse its discretion in denying defendant’s motion for a mistrial. See *Allen* at 618, 541 S.E.2d at 496. This argument is overruled.

IV. Conclusion

For the foregoing reasons, we find no error.

NO ERROR.

Judges McGEE and HUNTER, JR., Robert N. concur.

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[207 N.C. App. 483 (2010)]

ONE BEACON INSURANCE COMPANY AND WIRE-BOND, PLAINTIFFS v. UNITED
MECHANICAL CORPORATION, DEFENDANT

No. COA09-1691

(Filed 19 October 2010)

**Contracts—breach of contract—indemnity clause inapplicable—
summary judgment proper**

The trial court did not err in granting summary judgment in favor of defendant on plaintiffs' breach of contract claim arising from an alleged breach of an indemnity provision. No party contended that there was any material issue of fact in dispute and plaintiffs failed to allege facts or forecast any evidence that tended to support a finding that the claim for which they sought to be indemnified stemmed from defendant's acts or omissions.

Appeal by Plaintiffs from judgment entered 15 July 2008 by Judge Robert P. Johnston in Mecklenburg County Superior Court. Heard in the Court of Appeals 13 May 2009.

*The Law Office of Donald J. Vicini, P.C., by Donald J. Vicini,
for Plaintiff-Appellants.*

*Dean & Gibson, PLLC, by Jeremy S. Foster and Michael G.
Gibson, for Defendant-Appellees.*

ERVIN, Judge.

Plaintiffs One Beacon Insurance Company and Wire-Bond appeal from an award of summary judgment entered in favor of Defendant United Mechanical Corporation. After careful consideration of the arguments that Plaintiffs have advanced on appeal in light of the record and the applicable law, we conclude that the trial court's order should be affirmed.

I. Factual Background

Wire-Bond is a North Carolina corporation that procured liability insurance coverage from One Beacon. On 28 January 2005, Wire-Bond hired Industrial Piping, Inc., to fabricate and install an improved duct work venting system in Wire-Bond's facility. On 1 February 2005, Industrial Piping subcontracted with United Mechanical to perform the work which Industrial Piping had agreed to perform for Wire-Bond. The contract between United Mechanical and Industrial Piping, which identified Wire-Bond as the Owner, included an indemnity clause providing,

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in pertinent part, that United Mechanical “shall protect, fully indemnify, and hold harmless [Industrial Piping] and the Owner . . . from any demands, claims, liability, suits, losses, penalties, damages, or actions of any kind arising from or relating to any act or omission of Subcontractor[.]”

On 14 February 2005, Hazel Ray Myers, an employee of United Mechanical, was seriously injured while performing work related to the Industrial Piping-United Mechanical subcontract at Wire-Bond’s facility. Mr. Myers received workers’ compensation from United Mechanical as a result of his injuries. Subsequently, he pursued a personal injury claim against Wire-Bond. After Wire-Bond unsuccessfully demanded that United Mechanical provide it with a defense against Mr. Myers’ claim and indemnify it for any amounts paid to Mr. Myers, One Beacon settled Mr. Myers claim against Wire-Bond for \$1,480,000.00.

On 11 June 2009, Plaintiffs filed suit against United Mechanical for the purpose of attempting to recover damages for United Mechanical’s alleged breach of the indemnity clause in the Industrial Piping-United Mechanical contract. According to the allegations in Plaintiffs’ complaint, Wire-Bond was entitled to indemnification for the amounts paid to Mr. Myers because it was a third party beneficiary of the indemnity provision of the Industrial Piping-United Mechanical contract and One Beacon was subrogated to Wire-Bond’s rights under the indemnity provision as a result of the fact that it had paid Mr. Myers’ claim on behalf of Wire-Bond.

Defendant filed motions seeking summary judgment against One Beacon and Wire-Bond on 27 May 2009 and 25 June 2009, respectively. On 15 July 2009, the trial court entered an order granting summary judgment in favor of Defendant against both Plaintiffs. Plaintiffs noted an appeal to this Court from the trial court’s order.

II. Legal Analysis

A. Standard of Review

Summary judgment is appropriate when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009). “A defendant may show entitlement to summary judgment by: ‘(1) proving that an essential element of the plaintiff’s case is nonexistent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his

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or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense which would bar the claim.’” *Carcano v. JBSS, LLC*, — N.C. App. —, —, 684 S.E.2d 41, 46 (2009) (quoting *James v. Clark*, 118 N.C. App. 178, 181, 454 S.E.2d 826, 828, *disc. review denied*, 340 N.C. 359, 458 S.E.2d 187 (1995)).

“When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the non-moving party.” *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (citation omitted).

“Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial.” “To hold otherwise . . . would be to allow plaintiffs to rest on their pleadings, effectively neutralizing the useful and efficient procedural tool of summary judgment.”

Draughon v. Harnett Cty. Bd. of Educ., 158 N.C. App. 705, 708, 582 S.E.2d 345 (2003) (quoting *Gaunt v. Pittaway*, 139 N.C. App. 778, 784-85, 534 S.E.2d 660, 664, *disc. review denied*, 353 N.C. 262, 546 S.E.2d 401 (2000), *cert. denied*, 353 N.C. 371, 547 S.E.2d 810 (2001), *cert. denied*, 534 U.S. 950, 151 L. Ed. 2d 261, 122 S. Ct. 345 (2001), and *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 64, 414 S.E.2d 339, 342 (1992), *aff’d*, 358 N.C. 131, 591 S.E.2d 521 (2004)).

“An appeal from an order granting summary judgment solely raises issues of whether on the face of the record there is any genuine issue of material fact, and whether the prevailing party is entitled to judgment as a matter of law.” *Carcano*, — N.C. App. at —, 684 S.E.2d at 46 (citing *Smith-Price v. Charter Behavioral Health Sys.*, 164 N.C. App. 349, 352, 595 S.E.2d 778, 781 (2004)).

“We review a trial court’s order granting or denying summary judgment *de novo*. ‘Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment’ for that of the lower tribunal.” *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 347, 678 S.E.2d 351, 354 (2009) (quoting *In re Appeal of The Greens of Pine Glen Ltd. P’ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

As a result, summary judgment may be entered against a party if the nonmovant fails to allege or forecast evidence supporting all the elements of his claim. *See e.g., Edwards v. GE Lighting Sys., Inc.*, 193 N.C. App. 578, 582, 668 S.E.2d 114, 116 (2008) (reversing denial of

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summary judgment motion “because the complaint failed to state a claim for relief as provided for in *Woodson*”); *Fabrikant v. Currituck Cty.*, 174 N.C. App. 30, 38, 621 S.E.2d 19, 25-26 (2005) (stating that summary judgment was properly entered against a plaintiff whose complaint failed to allege a required element of waiver of sovereign immunity); *Northwestern Bank v. Roseman*, 81 N.C. App. 228, 231, 344 S.E.2d 120, 123 (1986), *aff’d*, 319 N.C. 394, 354 S.E.2d 238 (1987) (stating that, to avoid summary judgment, defendant “was required to allege facts that, if believed, would prove each element of [the defense asserted by defendant]”). Thus, in order to avoid the entry of summary judgment, Plaintiffs were required to allege sufficient facts and forecast sufficient evidence to make out a *prima facie* case that Defendant’s failure to indemnify them for their settlement with Mr. Myers constituted a breach of the indemnity provision of the Industrial Pipeline-United Mechanical contract.

B. Legal Analysis

1. Existence of Disputed Factual Issues

The first issue we must consider is whether the trial court correctly concluded that there were no issues of material fact arising from the factual allegations made and evidentiary forecasts submitted by the parties. As we understand the record, no party contends that any material issue of fact is in dispute in this case. On the contrary, Plaintiffs’ counsel expressly represented to the trial court that “the facts of this case obviously are not an issue in this Motion for Summary Judgment. This is a breach of contract case.” For that reason, both before the trial court and on appeal, all parties have relied on their preferred interpretations of various documents instead of advancing competing factual contentions. Thus, the trial court correctly concluded that this case “was appropriate for entry of a summary judgment order, because it presents issues of law rather than fact:

‘Each party based its claim upon the same sequence of events [and] . . . [n]either party has challenged the accuracy or authenticity of the documents establishing the occurrence of these events. Although the parties disagree on the legal significance of the established facts, the facts themselves are not in dispute. Consequently, we conclude that there is no genuine issue as to any material fact surrounding the trial court’s summary judgment order.’ ”

Musi v. Town of Shallotte, — N.C. App. —, —, 684 S.E.2d 892, 894 (2009) (quoting *Adams v. Jefferson-Pilot Life Ins. Co.*, 148 N.C.

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App. 356, 359, 558 S.E.2d 504, 507, *disc. review denied*, 356 S.E.2d 159, 568 S.E.2d 186 (2002).

2. Breach of Contract

We must next determine whether Defendant was entitled to the entry of judgment on Plaintiffs' breach of contract claim as a matter of law. "The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." *Ahmadi v. Triangle Rent a Car, Inc.*, — N.C. App. —, —, 691 S.E.2d 101, 103 (2010) (quoting *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000)). In order to determine whether Plaintiffs have alleged and forecast sufficient evidence to support their breach of contract claim, we must analyze the contents of the indemnity clause contained in the Industrial Piping-United Mechanical contract, a process which, in turn, requires consideration of (1) the general law of indemnity, (2) the language of the indemnity clause under consideration in this case, and (3) the limitations imposed upon indemnity agreements pursuant to N.C. Gen. Stat. § 22B-1 (2009).

"In indemnity contracts the engagement is to make good and save another harmless from loss on some obligation which he has incurred or is about to incur to a third party." *Casualty Co. v. Waller*, 233 N.C. 536, 537, 64 S.E.2d 826, 827 (1951). For that reason, "[i]ndemnity against losses does not cover losses for which the indemnitee is not liable to a third person, and which the indemnitee improperly pays." *Insurance Co. v. Hylton*, 7 N.C. App. 244, 250, 172 S.E.2d 226, 229 (1970) (quoting 41 Am. Jur. 2d, *Indemnity* § 27, p. 444). Thus, "if a plaintiff sues defendant A when the negligence of B is the sole proximate cause of plaintiff's injuries and A has no derivative, or imputed, liability for the acts of B, [then] A is not liable to the plaintiff and therefore not entitled to indemnity from B." *Edwards v. Hamill*, 262 N.C. 528, 531, 138 S.E.2d 151, 153 (1964).

The indemnity clause contained in the Industrial Piping-United Mechanical contract requires United Mechanical to "indemnify, and hold harmless [Industrial Piping] and the Owner . . . from any demands, claims, liability, suits, losses, penalties, damages, or actions of any kind arising from or relating to any act or omission of Subcontractor[.]" This language is consistent with N.C. Gen. Stat. § 22B-1, which provides that:

Any promise or agreement in, or in connection with, a contract or agreement relative to the design, planning, construction, alteration, repair or maintenance of a building, structure, . . . or appliance, . . .

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purporting to indemnify or hold harmless the promisee . . . against liability for damages arising out of bodily injury to persons or damage to property proximately caused by or resulting from the negligence, in whole or in part, of the promisee . . . is against public policy and is void and unenforceable. Nothing contained in this section shall prevent or prohibit a contract, promise or agreement whereby a promisor shall indemnify or hold harmless any promisee . . . against liability for damages resulting from the sole negligence of the promisor, its agents or employees. . . .

As a result, in order to properly support their breach of contract claim, Plaintiffs were required to allege facts and forecast evidence tending to show that (1) Mr. Myers' claim stemmed from injuries that, at least in part, arose "from or [were] relat[ed] to any act or omission" of United Mechanical and (2) that Plaintiffs were liable in damages for United Mechanical's acts or omissions.

On appeal, Plaintiffs acknowledge that, pursuant to N.C. Gen. Stat. § 22B-1, "a construction contract generally may not include a provision whereby a party is indemnified for its own negligence." However, Plaintiffs contend that the indemnity clause contained in the Industrial Piping-United Mechanical contract does not violate N.C. Gen. Stat. § 22B-1 because:

Nowhere within the indemnity language of the subcontract does it state that Wire-Bond will be indemnified for its own negligence. To the contrary, paragraph 10(a) presents a description of United [Mechanical's] comprehensive indemnity obligation[, n]amely, to indemnify for any claim arising from or relating to, and by reason of any act or omission of United [Mechanical] or anyone working for or under United [Mechanical]. . . . The subparagraphs under paragraph 10(a) then give specific examples of potential misconduct, negligent acts, errors, or omission[s] of United [Mechanical] that would require United [Mechanical] to indemnify and defend [Industrial Piping] and Wire-Bond. . . . Because the indemnity language does not seek to indemnify Wire-Bond for its own negligence, the contract does not violate N.C. Gen. Stat. [§] 22B-1.

Although Plaintiffs clearly concede that the plain language of both the indemnity provision and N.C. Gen. Stat. § 22B-1 limit Plaintiffs' indemnification rights to instances in which they have incurred liability arising from or relating to acts or omissions of United Mechanical, they have failed to allege facts or forecast any evidence that tends to support a finding that the claim for which they seek to be indemnified stemmed from United Mechanical's acts or omissions.

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According to Plaintiffs, Mr. Myers “filed a claim against Wire-Bond demanding compensation for his personal injuries and other damages” and One Beacon settled the claim “under the terms of its liability policy.” Plaintiffs did not, however, provide a copy of the document or documents evidencing Mr. Myers’ claim or the insurance policy that provided the coverage from which Mr. Myers’ claim was paid for consideration by the trial court at the hearing held in connection with United Mechanical’s summary judgment motion. For that reason, we are unable to determine whether the claim or claims that Mr. Myers asserted against Wire-Bond arose from or related to any “acts or omissions” by United Mechanical and, if so, whether the insurance policy provided by One Beacon covered liability stemming from United Mechanical’s acts or omissions. Furthermore, Plaintiffs did not allege in their complaint, forecast for purposes of the summary judgment hearing, or argue on appeal that Mr. Myers’ claim rested on a contention that his injuries arose from or were related to “any acts or omissions” of United Mechanical. For this reason, Plaintiffs have failed to allege facts or forecast evidence tending to show that their claim fell within the purview of the indemnity provision of the Industrial Piping-United Mechanical contract.

In addition, as we have already indicated, “[i]ndemnity does not cover payments to a third person for which the indemnitee is not liable and which the indemnitee voluntarily or improperly pays.” *City of Wilmington v. N.C. Natural Gas Corp.*, 117 N.C. App. 244, 250, 450 S.E.2d 573, 577 (1994) (citing 41 Am. Jur. 2d, *Indemnity* § 35). In seeking summary judgment, United Mechanical asserted that Plaintiffs’ payments to Mr. Myers “were voluntary and not recoverable.” During the hearing held before the trial court, United Mechanical contended that:

If [Plaintiffs] paid the claim, then, it had to be based on their independent acts of negligence because they could not have been held liable for any negligence on the part of [United Mechanical.]

. . . [T]hey do not have a valid indemnity claim because they could not be vicariously liable for the acts of United Mechanical in this case. So whatever they paid was a volunteer payment or a payment based on their own liability[.] . . .

. . . [Plaintiffs’ complaint] does not state a claim because they could not have been liable vicariously for the acts of United Mechanical as a matter of law . . . because they had no contact, no relationship, and no liability for any acts of United[.]

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After reviewing the record, we conclude that Plaintiffs failed to allege facts or forecast evidence tending to show that, if the claims that Mr. Myers' asserted against Plaintiffs did stem from acts or omissions by United Mechanical, Plaintiffs were liable as a result of those acts or omissions. Plaintiffs neither alleged in their complaint nor forecast evidence tending to show that they would have incurred any liability stemming from acts or omissions by United Mechanical. On appeal, Plaintiffs have not argued that they were liable for United Mechanical's actions nor advanced any legal theory upon which they might have been derivatively or vicariously liable for any acts or omissions of United Mechanical. For example, Plaintiffs have not alleged facts or forecast evidence that Wire-Bond had a contractual or any other relationship with Mr. Myers sufficient to support holding Wire-Bond liable for the injuries that he sustained or that Wire-Bond was liable to Mr. Myers based on the doctrine of *respondeat superior* or any other accepted legal theory. As a result, given our agreement with United Mechanical that an essential element of Plaintiffs' indemnity claim involved establishing that Plaintiffs' liability stemmed from acts or omissions on the part of United Mechanical and that Plaintiffs failed to make the required showing of derivative liability, we conclude that:

[D]efendant produced evidence demonstrating that an essential element of [Plaintiffs' claim] is nonexistent. Specifically, our examination of the record before us reveals that [Plaintiffs] failed to show that the loss complained of is embraced within the . . . language of the [indemnity clause]. . . . Given that defendant[] established that essential elements of the non-moving party's claims are nonexistent, the burden then shifted to [p]laintiff, the non-moving party, to forecast evidence or specific facts that demonstrate the existence of some sort of loss, [covered] under the terms of the [indemnity clause,] which [d]efendants refused to pay.

Defeat the Beat, Inc. v. Underwriters at Lloyd's London, 194 N.C. App. 108, 114-15, 669 S.E.2d 48, 52 (2008). Accordingly, Plaintiffs failed "to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that [they] can at least establish a *prima facie* case at trial." *Draughon*, 158 N.C. App. at 212, 580 S.E.2d at 735. For that reason, the trial court did not err by entering summary judgment against Plaintiffs and in favor of United Mechanical.

In seeking to persuade us to reach a contrary result, Plaintiffs assert that a genuine issue of material fact exists concerning the

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voluntariness of their settlement with Mr. Meyers. According to Plaintiffs, the mere fact that they entered into a settlement with Mr. Myers is not evidence of their negligence and that, without proof of their negligence, “the court is unable to make a conclusion, as a matter of law, that appellants’ settlement payment was voluntary.” Plaintiffs’ contention, however, lacks merit. As we have already discussed, both the indemnity provision of the Industrial Piping-United Mechanical contract and N.C. Gen. Stat. § 22B-1 limit Plaintiffs’ right to indemnification to amounts for which they were liable predicated on Defendant’s acts or omissions. For that reason, the relevant issue for purposes of Plaintiffs’ appeal is not whether the record establishes Plaintiffs’ negligence, but whether Plaintiffs have alleged facts or forecast evidence that, if accepted as true, would trigger an obligation on the part of United Mechanical to indemnify Plaintiffs based upon their liability for United Mechanical’s acts or omissions. No such allegations of fact or evidentiary forecast appear in the record.

In addition, Plaintiffs have advanced a number of statutory construction arguments on appeal. For example, Plaintiffs argue that the indemnity provision of the Industrial Piping-United Mechanical contract does not violate N.C. Gen. Stat. § 22B-1; that, in the event that the indemnity provision does violate N.C. Gen. Stat. § 22B-1, any such deficiency could be rectified by removing the offending language and enforcing the remainder of the indemnity provision; that Wire-Bond is a third party beneficiary of the indemnity clause, as that term is defined by statute; and that N.C. Gen. Stat. § 97-10.2 “recognizes” that third party beneficiaries have a right to recover under a contractual indemnity clause. In view of the fact that Plaintiffs have failed to show that the indemnity clause has any application to the present situation, we need not address these statutory construction arguments.

III. Conclusion

As a result, for the reasons set forth above, we conclude that the trial court did not err by granting summary judgment in favor of United Mechanical. Thus, the court’s order should be, and hereby is, affirmed.

AFFIRMED.

Judges BRYANT and ELMORE concur.

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STATE OF NORTH CAROLINA v. STEVE WILSON

No. COA10-268

(Filed 19 October 2010)

1. Appeal and Error— plain error review—prior objection to another witness—not sufficiently contemporaneous

Defendant did not timely object to testimony about the nature of prior warrants on which he was being arrested when he struggled with the officer, and the appellate review was for plain error only. Defendant objected when the arresting officer testified, but the evidence was actually given subsequently without objection by another officer.

2. Evidence— nature of prior warrants—no plain error

In a prosecution arising from an attempted arrest, there was no plain error in admitting testimony about the nature of the warrants on which defendant was being arrested when he struggled with the officer. The evidence against defendant was substantial and the violent nature of the crimes in the arrest warrants was relevant to understanding both the states of mind and actions of defendant and the officer.

3. Evidence— hearsay—internal affairs report—no plain error

There was no plain error in a prosecution arising from a struggle following an attempted arrest where the results of an internal affairs investigation that cleared the officer were admitted. The evidence of the offenses arising from the attempted arrest was overwhelming and defendant could not meet his burden of showing that evidence of the investigation altered the outcome of the trial.

Appeal by defendant from judgments entered 28 August 2009 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 15 September 2010.

Attorney General Roy Cooper, by Assistant Attorney General M. Elizabeth Guzman, for the State.

Paul F. Herzog for defendant-appellant.

BRYANT, Judge.

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Where a defendant fails to object to the admission of evidence and, on appeal, cannot show that the admission was error so fundamental that the jury probably would have reached a different result without the admission, he fails to show plain error and is not entitled to a new trial.

Facts

The evidence at trial tended to show the following. On 29 February 2008, Sergeant Tivon M. Howard of the Zebulon Police Department arrived to work the night shift and was told to be on the lookout for defendant Steve Wilson and an unknown black female in a red Pontiac Sunfire automobile. The two were sought in connection with felony warrants involving an assault and use of a firearm. Sgt. Howard was advised to use heightened caution in approaching defendant due to the nature of the offenses for which he was wanted. Sgt. Howard knew defendant from prior encounters. While on patrol that night, Sgt. Howard saw a red Sunfire at the gas pump of a convenience store. He parked his patrol car and entered the store. Sgt. Howard recognized a man in the store as defendant, and, as the man approached the counter, Sgt. Howard asked if he was Steve Wilson. When defendant became nervous, began stuttering, and failed to respond to the question, Sgt. Howard felt confident that defendant was Steve Wilson. Sgt. Howard advised defendant that he was wanted on active warrants and was under arrest.

Sgt. Howard then moved to block defendant's access to the door of the convenience store and approached him from behind with handcuffs. Sgt. Howard got one wrist handcuffed, but defendant repeatedly jerked his other wrist away, asking why he was being arrested. Sgt. Howard responded that he would tell defendant why he was being arrested once the handcuffs were on and ordered defendant to put his hands behind his back. Defendant refused and Sgt. Howard attempted to use his taser to subdue defendant. The taser failed to work and Sgt. Howard then sprayed defendant with "Cap Stun" chemical spray. Only some of the spray hit defendant who then charged Sgt. Howard. Sgt. Howard managed to get defendant in a headlock, but defendant grabbed the officer's service weapon and fired it at him. Sgt. Howard ducked behind the store's counter and was not struck by the bullet. Defendant then fled the store and drove away as the store clerk called 911. Sgt. Howard also radioed for help and explained the events that had occurred in the store.

Officer Edwin Kilette, also of the Zebulon Police Department, heard Sgt. Howard's radio call. Shortly thereafter, Officer Kilette heard

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a Wendell Police Department officer's radio call that a vehicle matching the description of defendant's was seen parked near some woods. When he arrived at the location, Officer Kilette saw the red Sunfire and defendant crouching in some nearby bushes. Officer Kilette and other officers who responded as back-up identified themselves as police officers and told defendant to stop. Instead, defendant ran. He was eventually found hiding beneath a propane tank, still wearing Sgt. Howard's handcuffs on one wrist.

The officers arrested defendant who stated that he needed medical treatment for his diabetes. While en route to the hospital, defendant stated, "It was an accident. It wasn't intentional." Defendant said he was sorry and claimed that he reacted to Sgt. Howard as he did because of his military service. Defendant also claimed that Sgt. Howard's use of the taser and chemical spray was unnecessary. A subsequent internal affairs investigation exonerated Sgt. Howard of any wrongdoing during the attempted arrest of defendant.

Defendant was indicted on charges of kidnapping, assault with a firearm on a law enforcement officer, possession of a firearm by a felon, and having attained the status of violent habitual felon. Defendant's trial at the August 24 criminal session of Wake County Superior Court was bifurcated, with the substantive charges being heard in the initial proceeding and the violent habitual felon status being heard on the final day of the trial. Prior to trial, defendant moved to suppress evidence and statements, which motion the trial court denied. At the hearing on defendant's pretrial motion to suppress, the State offered details about the nature of the unserved warrants which led to Sgt. Howard's attempted arrest of defendant. The evidence tended to show that the warrants were connected to an altercation between defendant's sister and her boyfriend on 16 February 2008. Following a fight between defendant's sister and her boyfriend, defendant accompanied his sister to the boyfriend's residence where he allegedly broke in and held several people inside at gunpoint. Warrants were then issued against defendant for kidnapping, burglary, possession of a firearm by a felon, assault with a deadly weapon inflicting serious injury, and assault by pointing a gun.

On the first day of trial, defendant moved to be allowed to represent himself. The trial court allowed defendant's motion and allowed defendant's request that his appointed counsel remain as standby counsel. At the close of evidence in the first phase of the trial, the State dismissed the kidnapping charge. Defendant was found guilty of assault with a firearm on a law enforcement officer and possession of a firearm by a

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felon. Defendant was represented by his appointed counsel in the second phase of the trial and was found guilty of having attained the status of violent habitual felon. The trial court sentenced defendant to life in prison without parole. Defendant appeals.

On appeal, defendant presents two arguments: the trial court erred in allowing the State to offer evidence about (I) the nature of the unserved warrants for which Sgt. Howard attempted to arrest him, and (II) the outcome of the internal affairs investigation clearing Sgt. Howard of wrongdoing in the attempted arrest.

Standard of Review

As our Supreme Court has noted that

[t]he general rule regarding admission of evidence is that “[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly, or by [the Rules of Evidence].” N.C.G.S. § 8C-1, Rule 402 (2003). The Rules of Evidence define relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” *Id.*, Rule 401. Further, “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” *Id.*, Rule 403 (2003). The decision whether to exclude evidence under Rule 403 of the Rules of Evidence is within the discretion of the trial court and will not be overturned absent an abuse of discretion. *See State v. Williams*, 334 N.C. 440, 460, 434 S.E.2d 588, 600 (1993), *judgment vacated on other grounds sub nom. North Carolina v. Bryant*, 511 U.S. 1001, 128 L. Ed. 2d 42 (1994), and *cert. denied*, 516 U.S. 833, 133 L. Ed. 2d 61 (1995); *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). “Abuse of discretion results where the court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *Hennis*, 323 N.C. at 285, 372 S.E.2d at 527.

State v. Campbell, 359 N.C. 644, 672-73, 617 S.E.2d 1, 19 (2005), *cert. denied*, *Campbell v. N.C.*, 547 U.S. 1073, 164 L. Ed. 2d 523 (2006).

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However, where a defendant does not object to the admission of evidence at trial, we review only for plain error. *State v. Gary*, 348 N.C. 510, 518, 501 S.E.2d 57, 63 (1998). “Under a plain error analysis, [a] defendant is entitled to a new trial only if the error was so fundamental that, absent the error, the jury probably would have reached a different result.” *State v. Jones*, 355 N.C. 117, 125, 558 S.E.2d 97, 1032 (2002) (citation omitted).

I

[1] Defendant first argues that the trial court erred in allowing evidence about the specific offenses listed in the unserved warrants for which Sgt. Howard attempted to arrest him. We disagree.

During *voir dire* at trial, the State informed the trial court that it planned to ask Sgt. Howard about the nature of the warrants in order to counter any suggestion by defendant that Sgt. Howard had been unreasonable in his use of force during the attempted arrest. Defendant, acting *pro se*, objected on grounds that the nature of the warrants was irrelevant. The trial court overruled the objection on grounds that the nature of the warrants was relevant to the mental states of both Sgt. Howard and defendant during the attempted arrest and because defendant had asked about the warrants during his cross-examination of another police officer called by the State.

However, back in front of the jury, testimony about the nature of the warrants actually came in not from Sgt. Howard, but rather via the testimony of Detective Sergeant Candace Thompson of the Zebulon Police Department. On direct examination, Det. Thompson listed the offenses named in the warrants and testified that she had told Sgt. Howard to be cautious because defendant was wanted on “felony warrants” and that “there was a gun involved.” Defendant did not object to Det. Thompson’s testimony.

Defendant contends he properly preserved this issue for our review by way of his objection to the State’s attempt to elicit testimony about the nature of the warrants from Sgt. Howard, citing *State v. Hazelwood* in support of his contention. 187 N.C. App. 94, 652 S.E.2d 63 (2007), *cert denied*, 363 N.C. 133, 673 S.E.2d 867 (2009). We find *Hazelwood* inapposite.

In order to preserve an issue for appellate review, a defendant must make a timely objection at trial. N.C. R. App. P. 10(a)(1) (2009). In *Hazelwood*, the defendant

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raised his hearsay objection while Trooper Jones was testifying, moments before [the d]efendant expected Trooper Jones to deliver an allegedly inadmissible statement to the jury. The trial court excused the jury and engaged in a lengthy discussion with the parties. The trial court overruled [the d]efendant's objection, the jury returned, and the trial resumed. Trooper Jones read [the d]efendant's statement to the jury within minutes of [the d]efendant's objection and the trial court's ruling. Under these circumstances, [the rules of appellate procedure] did not require [the d]efendant to renew his objection when Trooper Jones resumed his testimony. Defendant's prior objection was sufficiently contemporaneous with the challenged testimony to be considered "timely" for purposes of the appellate rules.

187 N.C. App. at 98, 652 S.E.2d at 66. Thus, in *Hazelwood*, the testimony came in from the same witness and "within minutes" of the defendant's objection. Here, in contrast, defendant objected to testimony from Sgt. Howard which objection the trial court overruled. However, the specific testimony which defendant now challenges was from a different witness, Det. Thompson. Although the record does not reflect the exact amount of time which elapsed between defendant's objection and Det. Thompson's testimony, it was more than a few minutes. Defendant's objection occurred before Sgt. Howard was called to the stand. The trial court then sent the jury out, conducted a *voir dire* hearing, ruled on the objection, and recalled the jury. Sgt. Howard then gave direct testimony and was cross-examined, and another witness was called and gave testimony before Det. Thompson was called to testify. More than 150 pages of trial transcript separate defendant's objection from the challenged testimony. On these facts, we conclude that defendant's objection was not timely and, thus, we review for plain error only.

[2] We conclude that defendant fails to meet his burden to show that, but for the admission of Det. Thompson's testimony, he would not have been convicted. As discussed above, the evidence against defendant on the charges related to resisting arrest was substantial. In addition, Sgt. Howard testified, without objection, about the general nature of the warrants against defendant; namely, that they were for violent felonies and that, as a result, he proceeded using "the highest alert level." We agree with the trial court that the violent nature of the crimes listed in defendant's arrest warrants was relevant to understanding both Sgt. Howard's and defendant's actions and states of mind during the attempted arrest. We see no prejudicial error in the admission of Det.

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Thompson's testimony listing the specific offenses in the warrants. This argument is overruled.

II

[3] Defendant also argues that the trial court erred in admitting evidence about the outcome of the internal affairs investigation clearing Sgt. Howard of wrongdoing in the attempted arrest. We disagree.

At trial, the State called Sgt. Howard and questioned him about the results of the internal affairs investigation into his actions during his attempted arrest of defendant. Sgt. Howard testified that he had been "completely exonerated." The State also called Sergeant Scott Finch of the Zebulon Police Department and questioned him about the internal affairs investigation. Sgt. Finch testified that the investigation concluded that "no violations" of department policies occurred and that Sgt. Howard was "exonerated in this matter." A copy of the internal affairs investigation report was also admitted into evidence. Defendant objected to neither Sgt. Howard's nor Finch's testimony nor to the report. Thus, we review admission of this evidence for plain error.

On appeal, defendant contends that the report and the officers' testimony were inadmissible hearsay. However, we do not need to address this contention, because we conclude that, even if the admission was error, it did not alter the outcome of defendant's trial and entitle him to a new trial. *See Jones*, 355 N.C. at 125, 558 S.E.2d at 103. To show plain error, defendant must show that the jury would probably not have convicted him of assault with a firearm on a law enforcement officer had it not known that an internal affairs investigations cleared Sgt. Howard of wrongdoing. The elements of this offense are: "(1) an assault; (2) with a firearm; (3) on a law enforcement officer; (4) while the officer is engaged in the performance of his or her duties." *State v. Haynesworth*, 146 N.C. App. 523, 531, 553 S.E.2d 103, 109 (2001); (citing N.C. Gen. Stat. § 14-34.5). The evidence presented at trial was overwhelming as to these elements.

In addition to the testimony from Sgt. Howard about defendant's actions during the attempted arrest, the State presented testimony from the owner of the convenience store where the incident took place and a clerk working there at the time. The owner testified, *inter alia*, that Sgt. Howard told defendant he was under arrest and asked him to put his hands behind his back to be handcuffed; defendant resisted and struggled with Sgt. Howard; Sgt. Howard tried to use his taser but it failed to hit defendant; Sgt. Howard then used his chemical spray; defendant

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tried to flee the store; a struggle ensued; and defendant eventually fired a gun at Sgt. Howard. The clerk also testified that defendant resisted when Sgt. Howard told him he was under arrest. The clerk stated that defendant repeatedly jerked or pulled away from Sgt. Howard as he tried to put the handcuffs on him. Finally, a videotape from the store's security camera was played for the jury which allowed them to see for themselves what occurred during the attempted arrest. Even if admission of evidence regarding the outcome of the internal affairs investigation was error, defendant cannot meet his burden to show it altered the outcome of the trial. This argument is overruled.

No error.

Judges STEELMAN and BEASLEY concur.

STATE OF NORTH CAROLINA v. BILLY GENE WILLIAMS

No. COA10-347

(Filed 19 October 2010)

1. Appeal and Error— writ of certiorari—jurisdiction—insufficient oral notice of appeal from satellite-based monitoring order

Although defendant's oral notice of appeal from the trial court's order enrolling defendant in satellite-based monitoring was insufficient to confer jurisdiction on the Court of Appeals, the Court granted defendant's petition for writ of *certiorari* to address the merits of his appeal under N.C. R. App. P. 21.

2. Satellite-Based Monitoring— enrollment in lifetime satellite-based monitoring—sexually violent offense—taking indecent liberties with child—recidivist

The trial court did not err by requiring defendant to enroll in lifetime satellite-based monitoring. Although findings 1 and 5 were not supported by competent evidence, the order was supported by necessary findings and was not itself erroneous.

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3. Constitutional Law— ex post facto laws—double jeopardy—no violation for enrollment in satellite-based monitoring

A defendant's enrollment in satellite-based monitoring (SBM) did not violate the prohibitions against *ex post facto* laws and double jeopardy. SBM is a civil remedy, and thus, application of SBM provisions do not violate the *ex post facto* clause. Further, double jeopardy does not apply since SBM is a civil regulatory scheme and not a punishment. The Court of Appeals declined to take judicial notice of the North Carolina Department of Correction Interim Policy.

Appeal by Defendant from orders entered by Judge William R. Pittman in Wake County Superior Court. Heard in the Court of Appeals 16 September 2010.

Attorney General Roy Cooper, by Assistant Attorney General Peter A. Regulski, for the State.

W. Michael Spivey for Defendant.

STEPHENS, Judge.

Facts

On 27 October 2008, Defendant was indicted on two counts of taking indecent liberties with a child in violation of N.C. Gen. Stat. § 14-202.1. Defendant entered into a plea agreement with the State, in which Defendant entered an *Alford* guilty plea¹ to the two counts of indecent liberties in exchange for the State's agreement to drop several other charges pending against Defendant.

On 1 December 2009, pursuant to Defendant's plea agreement, the trial court sentenced Defendant to 39 to 47 months in the custody of the Department of Correction for each charge.

At the conclusion of sentencing, the trial court conducted a hearing pursuant to N.C. Gen. Stat. § 14-208.40A to determine Defendant's eligibility for enrollment in a satellite-based monitoring ("SBM") program. Following the hearing, the court entered its Judicial Findings and

1. "A defendant enters into an *Alford* plea when he proclaims he is innocent, but 'intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt.'" *State v. Chery*, — N.C. App. —, —, 691 S.E.2d 40, 44 (2010) (quoting *North Carolina v. Alford*, 400 U.S. 25, 37, 27 L. Ed. 2d 162, 171 (1970)).

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Order for Sex Offenders—Active Punishment (“Order”)², in which the court found Defendant to be a recidivist as defined by N.C. Gen. Stat. § 14-208.6(2b) and ordered Defendant to be enrolled in SBM for his natural life pursuant to N.C. Gen. Stat. § 14-208.40A(c). From the SBM Order, Defendant appeals.

Grounds for Appellate Review

[1] At Defendant’s 1 December 2009 SBM hearing, Defendant gave oral notice of appeal from the trial court’s Order enrolling Defendant in SBM. This Court has held that “SBM hearings and proceedings are not criminal actions, but are instead a ‘civil regulatory scheme[.]’” *State v. Brooks*, — N.C. App. —, —, 693 S.E.2d 204, 206 (2010) (quoting *State v. Bare*, — N.C. App. —, —, 677 S.E.2d 518, 527 (2009)). Accordingly, Defendant’s oral notice of appeal is insufficient to confer jurisdiction on this Court. *See Brooks*, — N.C. App. at —, 693 S.E.2d at 206 (holding that oral notice of appeal from an SBM hearing or proceeding is insufficient to confer jurisdiction on this Court, and instructing that a defendant must, instead, give written notice of appeal with the clerk of superior court and serve copies of such notice upon all parties pursuant to N.C. R. App. P. 3(a)).

However, on 7 June 2010, Defendant filed with this Court a petition for writ of *certiorari*. In his petition, Defendant asserts that *Brooks* was not decided until 18 May 2010, nearly six months after Defendant’s oral notice of appeal. According to Defendant, “[t]he state of the law at the time [notice of appeal was given] was such that trial counsel reasonably believed that oral notice of appeal was appropriate and sufficient.”

Although SBM proceedings were considered part of a “civil regulatory scheme” at the time of Defendant’s appeal, *Bare*, — N.C. App. at —, 677 S.E.2d at 527, such that written notice of appeal was required at the time, in the interest of justice we elect to grant Defendant’s petition for writ of *certiorari* and address the merits of his appeal pursuant to N.C. R. App. P. 21 (2010).

Discussion

[2] Defendant first argues that the trial court erred in requiring Defendant to enroll in lifetime SBM on the ground that the evidence did not support its findings of fact and the Order.

2. For each charge against Defendant, the trial court entered identical, but separate, Orders enrolling Defendant in SBM. Although Defendant appeals from each Order, for ease of discussion, we refer to the two Orders as the “Order.” Any findings made by this Court respecting the Order should be read to refer to both Orders.

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Regarding a trial court's entry of an SBM order, "we review the trial court's findings of fact to determine whether they are supported by competent record evidence, and we review the trial court's conclusions of law for legal accuracy and to ensure that those conclusions reflect a correct application of law to the facts found." *State v. Kilby*, — N.C. App. —, —, 679 S.E.2d 430, 432 (2009) (quoting *State v. Garcia*, 358 N.C. 382, 391, 597 S.E.2d 724, 733 (2004), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005)).

In this case, the trial court entered its Order on the Administrative Office of the Courts ("AOC") form AOC-CR-615. In the Order, the trial court found that (1) Defendant has been convicted of a reportable conviction under N.C. Gen. Stat. § 14-208.6, specifically an offense against a minor under N.C. Gen. Stat. § 14-208.6(1i); (2) Defendant has not been classified as a sexually violent predator; (3) Defendant is a recidivist; (4) the offense of conviction is not an aggravated offense; (5) the offense of conviction did involve the physical, mental, or sexual abuse of a minor, and based on the risk assessment of the Department of Correction, Defendant requires the highest possible level of supervision and monitoring.

Based on these findings, the trial court ordered that Defendant be enrolled in SBM as follows:

It is further ordered that [D]efendant shall[,] upon release from imprisonment, be enrolled in a satellite-based monitoring program for his[] natural life, unless the monitoring program is terminated pursuant to G.S. 14-208.43.

On appeal, Defendant argues that findings 1 and 5 in the Order are not supported by competent evidence and that, as a result, the Order "does not contain the findings necessary to require [D]efendant to submit to lifetime satellite based monitoring[,] such that the entry of the Order was error. Defendant asks that this Court remand this case "to the trial court for it to make appropriate findings and enter an appropriate order."

We agree with Defendant's assertions that findings 1 and 5 are erroneous. With respect to finding 1, the trial court should have found that Defendant had been convicted of "a sexually violent offense under G.S. 14-208.6(5)" instead of "an offense against a minor under G.S. 14-208.6(1i)[.]" Defendant was not convicted of "an offense against a minor," as that phrase is defined in N.C. Gen. Stat. § 14-208.6 (2009).³

3. N.C. Gen. Stat. § 14-208.6 was amended in 2008 such that section 14-208.6(1i), which prior to the amendment defined "[o]ffense against a minor," now defines

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Rather, Defendant's indecent Stat. § 14-208.6(5). In its brief, the State concedes that this finding was error.

With respect to finding 5, Defendant's conviction did not involve abuse of a minor, as that phrase is defined in Article 27A of Chapter 14, such that the trial court should not have found that Defendant's conviction "did involve the physical, mental, or sexual abuse of a minor." The State also concedes that finding 5 was error.

Although we have determined that findings 1 and 5 were not supported by competent evidence, we nevertheless conclude that the trial court's order enrolling Defendant in lifetime SBM is supported by necessary findings such that the Order itself is not erroneous.

Enrollment in an SBM program is governed by N.C. Gen. Stat. § 14A-208.40A. Accordingly, before enrolling a defendant in lifetime SBM, the trial court must meet the requirements set forth in, and follow the procedures outlined in, N.C. Gen. Stat. § 14-208.40A. *See State v. Smith*, — N.C. App. —, 687 S.E.2d 525 (2010) (holding that the trial court erred in ordering lifetime SBM for defendant because it did not follow the procedures in N.C. Gen. Stat. § 14-208.40A).

N.C. Gen. Stat. § 14-208.40A provides in relevant part:

(a) *When an offender is convicted of a reportable conviction as defined by G.S. 14-208.6(4), during the sentencing phase, the district attorney shall present to the court any evidence that (i) the offender has been classified as a sexually violent predator pursuant to G.S. 14-208.20, (ii) the offender is a recidivist, (iii) the conviction offense was an aggravated offense, (iv) the conviction offense was a violation of G.S. 14-27.2A or G.S. 14-27.4A, or (v) the offense involved the physical, mental, or sexual abuse of a minor. The district attorney shall have no discretion to withhold any evidence required to be submitted to the court pursuant to this subsection.*

The offender shall be allowed to present to the court any evidence that the district attorney's evidence is not correct.

"[i]nternet." 2008 N.C. Sess. Laws ch. 220, § 1. "Offense against a minor" is now defined in section 14-208.6(1m). *Id.* This amendment became effective "May 1, 2009, and applies to persons who are required to be registered . . . on or after that date." *Id.* Although Defendant was required to be registered after the date the amendment became effective, Defendant was neither convicted of an offense against a minor nor convicted of an internet offense. It is clear from the record that the trial court completed its Order on an outdated AOC form.

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(b) After receipt of the evidence from the parties, the court shall determine whether the offender's conviction places the offender in one of the categories described in G.S.14-208.40 (a), *and if so, shall make a finding of fact of that determination, specifying whether* (i) the offender has been classified as a sexually violent predator pursuant to G.S. 14-208.20, (ii) *the offender is a recidivist*, (iii) the conviction offense was an aggravated offense, (iv) the conviction offense was a violation of G.S. 14-27.2A or G.S. 14-27.4A, or (v) the offense involved the physical, mental, or sexual abuse of a minor.

(c) *If the court finds that the offender has been classified as a sexually violent predator, is a recidivist, has committed an aggravated offense, or was convicted of G.S. 14-27.2A or G.S. 14-27.4A, the court shall order the offender to enroll in a satellite-based monitoring program for life.*

N.C. Gen. Stat. § 14-208.40A (2009) (emphasis added).

In this case, Defendant was convicted of a "reportable conviction as defined by G.S. 14-208.6(4)[.]" A reportable conviction is defined as "[a] final conviction for . . . a sexually violent offense[.]" N.C. Gen. Stat. § 14-208.6 (2009). A "[s]exually violent offense" means a violation of . . . G.S. 14-202.1 (taking indecent liberties with children)[.]" N.C. Gen. Stat. § 14-208.6(5). Defendant pled guilty to two counts of taking indecent liberties with a child. These offenses are sexually violent offenses, convictions for which are reportable.

At sentencing, pursuant to section 14-208.40A(a), the State presented to the court evidence that Defendant is a recidivist. Specifically, the State offered unopposed evidence that Defendant had been convicted of indecent liberties with a child in 1990. The statutory scheme defines a recidivist as a person "who has a prior conviction for an offense that is described in G.S. 14-208.6(4)." N.C. Gen. Stat. § 14-208.6(2b). As discussed above, section 14-208.6(4) includes indecent liberties with a child.

Following the State's presentation of the above evidence, and pursuant to section 14-208.40A(b), the trial court made a finding of fact in the Order specifying that Defendant is a recidivist.

Finally, pursuant to section 14-208.40A(c), because the court found that Defendant is a recidivist, the trial court ordered Defendant to enroll in SBM for life.

Based on the foregoing, we conclude that the trial court's Order fully complied with the requirements set forth in N.C. Gen. Stat.

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§ 14-208.40A, which outlines the procedure for enrolling a defendant in an SBM program. Accordingly, the Order is sufficient to require Defendant's enrollment in lifetime SBM. The findings entered in error are not necessary to support the Order and are mere surplusage. Defendant's argument is overruled.

[3] Defendant next argues that his enrollment in SBM violates the prohibitions against *ex post facto* laws and double jeopardy, as contained in the North Carolina and United States Constitutions.

In accord with our prior cases regarding sex offender registration, “we again conclude that Article 27A of Chapter 14 of the North Carolina General Statutes . . . was intended as ‘a civil and not a criminal remedy[.]’” *Bare*, — N.C. App. at —, 677 S.E.2d at 527 (quoting *State v. Sakobie*, 165 N.C. App. 447, 452, 598 S.E.2d 615, 618 (2004)). Because this Court has found that SBM is a civil remedy, “application of the SBM provisions do not violate the *ex post facto* clause.” *Id.* at —, 677 S.E.2d at 531.

As for Defendant's double jeopardy argument, this Court has previously held that

an argument that SBM violates double jeopardy would fail because SBM is a civil regulatory scheme. Defendant has not been prosecuted a second time for any previously committed offenses, but contends he has been subjected to additional punishments. As we have already held that SBM is a civil regulatory scheme, and not a punishment, double jeopardy does not apply. This argument is without merit.

State v. Wagoner, — N.C. App. —, —, 683 S.E.2d 391, 400 (2009) (citation omitted).

In light of this Court's previous decisions, we are constrained to hold that Defendant's enrollment in SBM is not punishment. *See In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (“Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.”).

As a means of distinguishing this case from the *Bare* and *Wagoner* cases, Defendant invites this Court to take judicial notice of—and base its decision on—the North Carolina Department of Correction Policies—Procedures, No. VII.F Sex Offender Management Interim Policy 2007 (“Interim Policy”). Defendant asserts that “the impact of the Department of Correction[] regulations implementing satellite based monitoring was argued in the trial court.” However, neither party

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specifically mentioned the Interim Policy before the trial court, and there are no findings by the trial court as to the Interim Policy or its effect on Defendant. Rather, at trial, Defendant only mentioned the dissent in *State v. Morrow*, — N.C. App. —, 683 S.E.2d 754 (2009), which itself discusses the Interim Policy, and a 21 December 2006 Department of Correction administrative memorandum defining “recidivist.” We further note that the Interim Policy is not included in the record for this appeal, but rather is appended to Defendant’s brief.

As this Court held in *State v. Vogt*, — N.C. App. —, 685 S.E.2d 23 (2009),

[a] decision to judicially notice the [Interim Policy] in this case does not simply have the effect of filling a gap in the record or supplying a missing, essentially undisputed fact; instead, judicially noticing the [Interim Policy] in this case introduces a large volume of additional information which has not been subjected to adversarial testing in the trial courts.

Id. at —, 685 S.E.2d at 26. For these reasons, we decline to take judicial notice of the Interim Policy. The SBM Order of the trial court is

AFFIRMED.

Judge JACKSON concurs.

Judge ELMORE concurs in the result only.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, PLAINTIFF V.
MITCHELL DREW JENKINS, DEFENDANT

No. COA09-1523

(Filed 19 October 2010)

Insurance— underinsured motorist coverage—no selection form—opportunity consciously rejected

Summary judgment was properly entered for plaintiff-insurer in a declaratory judgment action to determine whether defendant was entitled to underinsured motorist (UIM) coverage. Despite the lack of a selection/rejection form, there was no dispute that

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the co-holder of the policy had the opportunity to reject or select different UIM coverage limits.

Appeal by defendant from order entered 18 June 2009 by Judge Anderson D. Cromer in Superior Court, Surry County. Heard in the Court of Appeals 28 April 2010.

Willardson Lipscomb & Miller, L.L.P., by William F. Lipscomb, for plaintiff-appellee.

Lewis & Daggett, Attorneys at Law, P.A., by Douglas E. Nauman, for defendant-appellant.

Young Moore and Henderson P.A. by Glenn C. Raynor and Bryan G. Scott, for the North Carolina Association of Defense Attorneys, amicus curiae.

STROUD, Judge.

Defendant appeals a summary judgment order allowing summary judgment in favor of plaintiff for a declaratory judgment that defendant was not entitled to underinsured motorist coverage. As we have concluded that one of the policy holders was given the opportunity to reject or select differing coverage amounts of underinsured motorist coverage, there are no genuine issues of material fact and plaintiff is entitled to judgment as a matter of law. Accordingly, we affirm the trial court's entry of summary judgment in favor of plaintiff.

I. Background

On 2 May 2008, plaintiff North Carolina Farm Bureau Mutual Insurance Company filed a declaratory judgment action against Mitchell Drew Jenkins. Plaintiff alleged that on 4 November 2006 defendant was a passenger in his Toyota vehicle, which was driven by his brother, Jamie Matthew Jenkins, when it collided with a vehicle driven by Candice Renee Fore. Defendant was injured in the collision. Plaintiff alleged further that

5. The Jenkins vehicle was covered by a personal auto policy (policy no. APM 4763616) issued by plaintiff to defendant which provided bodily injury liability coverage in the amount of \$50,000 per person / \$100,000 per accident.

6. On 11/04/2006 Jamie Matthew Jenkins was a named insured of a personal auto policy (policy no. APM 4098068) issued by plaintiff to Jamie Jenkins and his spouse (Sharon D. Jenkins),

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which also provided bodily injury liability coverage in the amount of \$50,000 per person / \$100,000 per accident.

7. Plaintiff has offered to pay to defendant the \$50,000 of liability coverage of the policy issued to defendant (APM 4763616) which covered the vehicle involved in the accident. Plaintiff has also offered to pay to defendant the \$50,000 of liability coverage of the policy issued to Jamie Jenkins and his spouse (APM 4098068).

8. Defendant contends his damages exceed \$100,000 and that he is entitled to receive from plaintiff underinsured motorists (UIM) coverage pursuant to one or both of the Farm Bureau policies stated above.

9. Plaintiff disagrees with defendant's contention and contends that defendant is not entitled to any UIM coverage. The Farm Bureau policy issued to defendant provides UIM coverage in the amount of \$50,000 per person /\$100,000 per accident but defendant is not entitled to any UIM coverage regarding the 11/04/2006 accident because the limit of liability of the UIM coverage is not greater than the limit of liability of the liability coverage. The Farm Bureau policy issued to Jamie Jenkins and his spouse does not provide any UIM coverage.

Plaintiff requested "a declaratory judgment that defendant is not entitled to any UIM coverage regarding the 11/04/2006 accident in question[.]" On 2 July 2008, defendant answered plaintiff's complaint and counterclaimed requesting, *inter alia*, "[t]he Court adjudge that he is entitled to underinsured coverage at the highest available limit of \$1,000,000.00 pursuant to the policies issued by Plaintiff Farm Bureau[.]"

On or about 16 February 2009, defendant filed a motion for summary judgment which stated defendant's argument as to the applicability of UIM coverage of \$1,000,000.00 as follows:

The grounds for Defendant's Motion include that there is no genuine issue of material fact that neither Jamie Jenkins nor Sharon Jenkins were provided, pursuant to N.C.G.S. § 20-279.21(b)(4), an opportunity, at any point between the inception of North Carolina Farm Bureau Policy No. APM 4098068 on August 15, 1994, and the date of loss on November 4, 2006, to select uninsured/underinsured motorist coverage limits greater than the liability limits appearing on North Carolina Farm Bureau Policy No.

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APM 4098068, and therefore, under N.C.G.S. § 20-279.21(b)(4), Plaintiff, under North Carolina Farm Bureau Policy No. APM 4098068, must afford to Defendant the statutory maximum uninsured/underinsured motorist coverage of \$1,000,000.00.

In support, hereof, Defendant shows the court that . . . there is no selection/rejection form for North Carolina Farm Bureau Policy No. APM 4098068, and it further appearing that there is an absence of any evidence establishing the named insureds were provided with an opportunity to select or reject uninsured or combined uninsured/underinsured coverage at limits different than the liability limits[.]

On 6 May 2009, plaintiff filed a motion for summary judgment alleging that “Sharon [Jenkins]¹ was offered UIM coverage at the various amounts available up to \$1,000,000 and she chose not to purchase UIM coverage.” Plaintiff filed several affidavits with its motion. Ms. Sharon Jenkins submitted an affidavit that stated the following:

I chose uninsured motorists coverage in the amount of \$50,000 for each person, and \$100,000 for each accident. I chose not to purchase underinsured motorists coverage. I cannot remember whether I signed a Selection/Rejection form It is possible that I signed one. I simply do not remember one way or the other.

I understood then and I understand now that I can purchase uninsured motorists coverage or combined uninsured/underinsured motorists coverage in various amounts up to \$1,000,000. I have renewed this same personal auto policy every six months since 1994 and I have never changed my decision to buy uninsured motorists coverage but not underinsured motorists coverage.

Various employees of plaintiff also submitted affidavits regarding the company’s procedures and routine practices. On 18 June 2009, the trial court allowed plaintiff’s motion for summary judgment, denied defendant’s motion for summary judgment, and dismissed defendant’s counterclaim with prejudice determining “that defendant is not entitled to any UIM coverage regarding the 11/04/2006 accident[.]” Defendant appeals.

1. According to Sharon D. Jenkins’s affidavit, her name was Sharon Boyd until “sometime in 1994[.]” She married Jamie M. Jenkins in 1993 and later changed her last name.

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II. Summary Judgment

Defendant contends that the trial court erred in allowing summary judgment in favor of plaintiff because *Williams v. Nationwide*, 174 N.C. App. 601, 621 S.E.2d 644 (2005) mandates that “Defendant is entitled to a judgment as a matter of law declaring that North Carolina Farm Bureau Mutual Insurance Company Policy APM4098068 provides UIM coverage with limits of \$1,000,000 per person and \$1,000,000 per accident[.]” (Original in all caps.) We disagree.

Our standard of review when the trial court allows an order for summary judgment “is *de novo*, and we view the evidence in the light most favorable to the non-movant.” *Scott & Jones v. Carlton Ins. Agency Inc.*, — N.C. App. —, —, 677 S.E.2d 848, 850 (2009) (citation omitted). The standard of review for an order allowing

a motion for summary judgment requires a two-part analysis of whether, (1) the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law.

Von Viczay v. Thoms, 140 N.C. App. 737, 738, 538 S.E.2d 629, 630 (2000) (citation and quotation marks omitted), *aff’d per curiam*, 353 N.C. 445, 545 S.E.2d 210 (2001).

Our Court recently decided the case of *Nationwide Mut. Ins. Co. v. Burgdoff*, — N.C. App. —, — S.E.2d (Sept. 7, 2010) (No. COA09-1117). In *Burdoff*, this Court analyzed previous cases, including *Williams*, and concluded that “the relevant inquiry . . . is whether defedants were given *the opportunity* to reject or select different UIM coverage limits.” *Id.* at —, — S.E.2d at — (emphasis in original). The facts in *Burdoff* are as follows:

Donald (“Mr. Burgdoff”) and Cynthia (“Mrs. Burgdoff”) Burgdoff, both individually and as co-executors of the Estate of Patricia Eleanor Burgdoff (collectively “defendants”), appeal an order granting summary judgment to Nationwide Mutual Insurance Company (“plaintiff”). . . .

In October 1995, Mrs. Burgdoff met with plaintiff’s licensed insurance agent Susan Bare (“Ms. Bare”), in order to obtain automobile insurance. Mrs. Burgdoff and Ms. Bare discussed the types of coverages available. On the basis of these discussions, Mrs. Burgdoff completed an “Automobile Insurance Application,” which

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requested, *inter alia*, bodily injury insurance coverage for uninsured and underinsured motorists (“UM/UIM”), in the maximum amount of \$100,000 per person and \$300,000 per accident (“100/300”). On 4 October 1995, Mrs. Burgdoff signed a “Personal Auto Closing Statement” (“the closing statement”). However, Mrs. Burgdoff did not execute a North Carolina Rate Bureau UM/UIM Selection/Rejection Form (“selection/rejection form”) when she signed the closing statement. Defendants were then issued an automobile insurance policy by plaintiff, effective 4 October 1995 (“the Burgdoff policy”). The Burgdoff policy, with its corresponding coverage limits, has been repeatedly renewed by defendants and was still in effect at the time of the filing of this action.

On 8 December 2006, defendants’ eight-year-old daughter, Patricia Eleanor Burgdoff (“Patricia”), was killed in an automobile accident. As a result of the accident, defendants filed a wrongful death action against Ross Edward Neese (“Neese”) in Rowan County Superior Court. At the time of the accident, Neese had a liability insurance policy in effect with North Carolina Farm Bureau Insurance Group (“the Neese policy”). The Neese policy contained a personal liability limit of \$100,000 per person.

Because defendants sought damages from Neese in excess of the \$100,000 personal liability limit contained in the Neese policy, they notified plaintiff of their intention to seek recovery under the UIM provision of the Burgdoff policy. . . .

On 24 September 2009, plaintiff filed a “Complaint for Declaratory Judgment” under Rule 57 of the North Carolina Rules of Civil Procedure in Rowan County Superior Court. Plaintiff sought a determination of the amount of UIM coverage available to defendants under the Burgdoff policy. Plaintiff and defendants each filed motions for summary judgment. After a hearing on 14 May 2009, the trial court granted summary judgment to plaintiff and issued a Declaration of Judgment that defendants were entitled to UM/UIM coverage in the amount of 100/300. Defendants appeal.

Id. at —, S.E.2d at —.

N.C. Gen. Stat. § 20-279.21(b)(4), the relevant statute here and in *Burgdoff*, provided:

The coverage required under this subdivision shall not be applicable where any insured named in the policy rejects the cov-

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erage. An insured named in the policy may select different coverage limits as provided in this subdivision. If the named insured does not reject underinsured motorist coverage and does not select different coverage limits, the amount of underinsured motorist coverage shall be equal to the highest limit of bodily injury liability coverage for any one vehicle in the policy. Once the option to reject underinsured motorist coverage or to select different coverage limits is offered by the insurer, the insurer is not required to offer the option in any renewal, reinstatement, substitute, amended, altered, modified, transfer, or replacement policy unless a named insured makes a written request to exercise a different option. The selection or rejection of underinsured motorist coverage by a named insured or the failure to select or reject is valid and binding on all insureds and vehicles under the policy.

Rejection of or selection of different coverage limits for underinsured motorist coverage for policies under the jurisdiction of the North Carolina Rate Bureau shall be made in writing by the named insured on a form promulgated by the Bureau and approved by the Commissioner of Insurance.

N.C. Gen. Stat. § 20-279.21(b)(4) (Nov. 1993).

In *Burgdoff*, this Court went on to consider the Supreme Court case of *State Farm Mut. Auto. Ins. Co. v. Fortin*, 350 N.C. 264, 513 S.E.2d 782 (1999) and *Williams* and determined that

[t]he *per se* rule suggested by defendants, that the *Williams* analysis must apply whenever an insurer does not produce a valid selection/rejection form, cannot be reconciled with our Supreme Court's holding in *Fortin*. The facts in *Fortin* clearly indicate that the insured, upon renewal, was not provided with the proper North Carolina Rate Bureau selection/rejection form, but this failure of the insurance company to provide the form did not result in an increase in UIM coverage beyond the statutory limits of N.C. Gen. Stat. § 20-279.21(b)(4). Along these same lines, the deciding factor for the *Williams* Court was not that the insured was not provided with the proper selection/rejection form; instead, the Court emphasized that the insured was not provided with any opportunity at all to even consider UIM coverage. . . . Therefore, the relevant inquiry in determining whether *Williams* applies is whether defendants were given *the opportunity* to reject or select different UIM coverage limits.

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Id. at —, — S.E.2d at — (emphasis in original). Our Court in *Burgdoff* went on to reverse the summary judgment order because there was “a genuine issue of material fact as to whether plaintiff provided defendants with the opportunity to reject or select different UIM coverage limits[.]” *Id.* at —, — S.E.2d at —. The evidence presented by the plaintiffs showed that the defendants had been given an “opportunity to reject or select different UIM coverage limits.” *Id.* at —, — S.E.2d at —. However, the defendants’ forecast of evidence showed the defendants “were not informed that they could select an amount of UIM coverage that was different from the amount of liability coverage.” *Id.* at —, — S.E.2d at —. Thus, there was “a genuine issue of material fact as to whether plaintiff provided defendants with the opportunity to reject or select different UIM coverage limits[.]” *Id.* at —, — S.E.2d at —.

Based upon *Burgdoff*, the dispositive issue before us is whether there is a genuine issue of material fact as to “whether defendants were given the opportunity to reject or select different UIM coverage limits.” *Id.* at —, — S.E.2d at —. Defendant dedicates a large portion of his brief to argument regarding why plaintiff’s employee’s affidavits regarding “routine business practices” should not be considered competent evidence; however, even if we disregard plaintiff’s employee’s affidavits, the affidavit of Ms. Jenkins, the co-policy holder, is dispositive of the question at hand. Ms. Jenkins stated in her affidavit, “I chose not to purchase underinsured motorists coverage” and

I understood then and I understand now that I can purchase uninsured motorists coverage or combined uninsured/underinsured motorists coverage in various amounts up to \$1,000,000. I have renewed this same personal auto policy every six months since 1994 and I have never changed my decision to buy uninsured motorists coverage but not underinsured motorists coverage.

This evidence alone establishes Ms. Jenkins was “given the opportunity to reject or select different UIM coverage limits.” *Id.* at —, — S.E.2d at —. Her affidavit shows that she was aware of her options as to uninsured/underinsured motorist coverage and that she made a conscious decision not to purchase UIM coverage. Accordingly, *Williams* does not control this case, *see id.* at —, — S.E.2d at —, and summary judgment was properly allowed in favor of plaintiff. Despite the lack of the selection/rejection form, there is no dispute that Ms. Jenkins had the opportunity to reject or select different UIM coverage limits, so plaintiff is entitled to the relief requested, “a

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declaratory judgment that defendant is not entitled to any UIM coverage regarding the 11/04/2006 accident[.]”

III. Conclusion

As we conclude that the co-policy holder was provided “the opportunity to reject or select different UIM coverage limits[.]” *id.* at —, — S.E.2d at —, we affirm the order of the trial court allowing summary judgment in favor of plaintiff.

AFFIRMED.

Judges McGEE and HUNTER, JR., Robert N. concur.

ROSA FAYE AUTRY, PLAINTIFF v. RAY LYNN AUTRY, DEFENDANT

No. COA09-1495

(Filed 19 October 2010)

1. Civil Procedure— Rule 60—specific section identified

There was no lack of clarity about the section of N.C.G.S. § 1A-1, Rule 60(b) upon which the trial court relied in issuing an order relieving plaintiff of a memorandum of judgment in an action for alimony and related issues. The court specifically stated that the statements made by defendant’s attorney constituted “factual misrepresentation,” a basis enumerated in Rule 60(b)(3).

2. Civil Procedure— Rule 60—findings—supported by record

The record supported the trial court’s finding of fact in a proceeding under N.C.G.S. § 1A-1, Rule 60 that plaintiff or her counsel reasonably relied on a comment by defense counsel that a mortgage was no longer a lien against a house.

3. Compromise and Settlement— settlement agreement—procured through misrepresentation—could not be ratified

A settlement agreement procured by a misrepresentation could not be ratified by a partial execution because the fault in the judgment was one party’s alleged wrongdoing in forming the agreement.

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4. Civil Procedure— Rule 52—motion for additional findings—full relief granted

The trial court did not exceed its authority under N.C.G.S. § 1A-1, Rule 52(b) when, in response to plaintiff's motion for additional findings and conclusions, the court amended its order to relieve plaintiff entirely of a prior memorandum of judgment and formal order, as plaintiff had originally sought in her motion. There was sufficient evidence in plaintiff's motion for the additional findings.

Appeal by defendant from order entered 24 September 2009 by Judge Louis F. Foy, Jr., in Sampson County District Court. Heard in the Court of Appeals 15 April 2010.

Warrick, Railey & Bradshaw, P.A., by Corinne A. Railey, for plaintiff.

Gregory T. Griffin for defendant.

ELMORE, Judge.

Rosa Fay Autry (plaintiff) and Ray Lynn Autry (defendant) were married on 26 April 1997 and divorced on 24 November 2007. In her complaint, plaintiff requested post-separation support, alimony, equitable distribution, and attorney's fees. A trial was held on 14 January 2009 in Sampson County District Court on the issues of temporary post-separation support and attorney fees.

During their marriage, the parties occupied a house with title in both parties' names. At the time of the divorce, the house was encumbered by a second mortgage from Beneficial Mortgage Company of North Carolina (Beneficial mortgage). The Beneficial mortgage was secured by a deed of trust filed with the Sampson County Register of Deeds.

Plaintiff filed a petition for individual Chapter 13 bankruptcy on 29 April 2008. Plaintiff listed the Beneficial mortgage in her petition, but claimed she was not liable for the mortgage, although the public records indicate that both parties signed the deed of trust.

Defendant filed his own bankruptcy petition pursuant to Chapter 7 on 7 May 2008. Defendant was discharged from the Beneficial mortgage as a result of the bankruptcy proceedings.

During the trial on 14 January 2009, counsel for defendant, in response to a question by the court, made a comment that the

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Beneficial mortgage was no longer a lien against the house. The following exchange took place:

[Defense counsel]: [T]he debt has been discharged. In the petition that she filed, she's not liable for that debt. . . .

Trial court: Is that no longer a lien against the house?

[Defense counsel]: No.

After the court took a lunch recess, counsel for the parties discussed a possible settlement. A settlement was reached, and the parties entered into a memorandum of judgment. In this memorandum of judgment, defendant agreed, among other things, to convey his rights to the house to plaintiff and to pay plaintiff \$2,500.00.

The memorandum of judgment was executed by the parties in open court. On 26 January 2009, the court entered a formal order adopting the memorandum of judgment and dismissing with prejudice all claims between the parties. Defendant executed a quitclaim deed conveying his interest in the house to plaintiff and issued a cashier's check for \$2,500.00 to plaintiff.

On 5 February 2009, plaintiff filed a motion for relief from judgment, pursuant to Rule 60 of the North Carolina Rules of Civil Procedure, relating to the judgment executed on 14 January 2009. As grounds for the motion, plaintiff offered several pieces of evidence. First, plaintiff presented evidence that defendant's attorney made statements in court and on the record that the Beneficial mortgage had been discharged. Next, plaintiff presented a copy of the deed of trust as evidence that the Beneficial mortgage continued to be a lien on the property. Finally, plaintiff showed that she arrived at the settlement based on a good faith belief that the statements by defendant's attorney regarding the mortgage were true.

In a one-paragraph order issued on 18 June 2009, the trial court partially granted plaintiff's motion. The trial court made no conclusions in the order. Plaintiff filed a motion pursuant to Rule 52 of the North Carolina Rules of Civil Procedure, requesting the trial court to make "findings of fact and conclusions of law in addition to those previously made."

The trial court then amended the order and issued an amended order dated 24 September 2009 entirely relieving plaintiff of the memorandum of judgment and subsequent order. The amended order

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contains several findings of fact and conclusions of law. The findings of facts include: (1) that “counsel for Defendant . . . stated to the Court that the [Beneficial] debt had been discharged”; (2) “[t]hat Beneficial Mortgage Co. of North Carolina continues to have a Deed of Trust filed with the Sampson County Register of Deeds in Book 1419 at Page 955”; and (3) “[t]hat Plaintiff’s counsel relied in good faith on the factual misrepresentations made by Attorney Griffin in arriving at settlement of the case.” Conclusion of law 1 states that “[p]laintiff’s Counsel reasonably relied on the factual misrepresentations made by the Attorney for Defendant who is also the Defendant’s bankruptcy attorney.” Defendant appeals from this order.

“[T]he standard of review of a trial court’s denial of a Rule 60(b) motion is abuse of discretion.” *Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006) (citing *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975)). To show an abuse of discretion, an appellant must show that the trial court’s ruling was “manifestly unsupported by reason or . . . so arbitrary that it could not have been the result of a reasoned decision.” *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998) (citing *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)).

[1] Defendant first argues that it is unclear which section of Rule 60(b) the trial court used in issuing its order. We disagree.

Rule 60(b) of the North Carolina Rules of Civil Procedure provides several reasons for relieving a party of his legal obligations stemming from a final judgment or order. These reasons include:

- (1) Mistake, inadvertence, surprise or excusable neglect;
- (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) Fraud (whether heretofore denominated intrinsic or extrinsic), *misrepresentation*, or other misconduct of an adverse party;
- (4) The judgment is void;
- (5) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

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(6) Any other reason justifying relief from the operation of the judgment.

N.C. Gen. Stat. § 1A-1, Rule 60(b) (2009) (emphasis added).

As noted above, the trial court in conclusion of law 1 specifically stated that the statements made by defendant's attorney constituted "factual misrepresentations[,] a basis enumerated in Rule (60)(b)(3). N.C. Gen. Stat. § 1A-1, Rule 60(b) (2009). The trial court clearly made its holding pursuant to this provision.

[2] Next, defendant argues that the record does not support the trial court's finding of fact that plaintiff, or her counsel, reasonably relied on the comment that the Beneficial mortgage was no longer a lien against the house. We disagree.

"The trial judge has the duty to make findings of fact, which are deemed conclusive on appeal if there is any evidence on which to base such findings." *Briley*, 348 N.C. at 547, 501 S.E.2d at 655 (citing *Hoglen v. James*, 38 N.C. App. 728, 731, 248 S.E.2d 901, 903 (1978)).

As to whether plaintiff relied on the statement, defendant argues that plaintiff was already aware that the Beneficial mortgage existed before the in-court statement was made or that, if she was not, her attorney could easily have discovered it by investigating. Regardless of whether or not these statements are true, the transcript contains the above-quoted exchange between defendant's attorney and the court wherein defendant's attorney stated that the Beneficial mortgage was no longer a lien against the property. As such, the record contains evidence on which this finding was based, and it is deemed conclusive.

[3] Defendant next argues that, because plaintiff accepted the benefits of the memorandum of judgment and subsequent order, she cannot now challenge their validity. Specifically, defendant claims that plaintiff ratified the memorandum of judgment and order by her acceptance and retention of the \$2,500.00 cashier's check and quitclaim deed as benefits. We disagree.

For his argument, defendant relies on *Sea Ranch II Owners Ass'n v. Sea Ranch II, Inc.*, which applies the rule that "a party is equitably estopped from attacking 'the terms of [an] Order which he acknowledged, acquiesced in and attempted to modify and enforce. . . .'" 180 N.C. App. 226, 230, 636 S.E.2d 332, 334-35 (2006) (quoting *Chance v. Henderson*, 134 N.C. App. 657, 666, 518 S.E.2d 780, 786 (1999)); alter-

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ations in original). However, *Sea Ranch* applies that principle in the context of a motion made pursuant to subsection (b)(4) of the Rule—that is, upon grounds that the judgment is void. *Id.* The remaining cases that defendant cites concern ratification in the context of summary judgment motions and are thus inapposite to the case *sub judice*. See, e.g., *Boyd v. Boyd*, 156 N.C. App. 218, 576 S.E.2d 142, 2003 N.C. App. LEXIS 138 (2003) (unpublished); *Goodwin v. Webb*, 152 N.C. App. 650, 568 S.E.2d 311 (2002), *rev'd per curiam by* 357 N.C. 40, 577 S.E.2d 621 (2003); *Lowry v. Lowry*, 99 N.C. App. 246, 393 S.E.2d 141 (1990); *Hill v. Hill*, 94 N.C. App. 474, 380 S.E.2d 540 (1989).

This Court has stated before that “a void judgment [is] ‘one which has a mere semblance but is lacking in some of the essential elements which would *authorize the court to proceed to judgment.*’” *Allred v. Tucci*, 85 N.C. App. 138, 142, 354 S.E.2d 291, 294 (1987) (quoting *Monroe v. Niven*, 221 N.C. 362, 364, 20 S.E.2d 311, 312 (1942)) (emphasis added). Unlike the case at hand, then, where one party argues that there was misconduct by the other party to induce the creation of the contract, subsection (b)(4) applies to judgments entered by courts unauthorized to enter them. Logically, then, the parties—whose actions are not the source of the defect in the judgment—may ratify the judgment by their conduct, and so our Courts have held. But where the “fault” in the judgment is one party’s alleged wrongdoing in forming the agreement—wrongdoing discovered by the other party during execution of the agreement—logically, that partial execution cannot be construed as ratification of the agreement, and indeed our Courts have never so held. Thus, defendant’s argument that plaintiff ratified the order is irrelevant in the context of Rule 60(b)(3), and it is overruled.

[4] Defendant’s final argument is that the trial court exceeded its authority pursuant to Rule 52(b) by changing the relief afforded to plaintiff under the original order. This argument is without merit.

Rule 52(b) of the North Carolina Rules of Civil Procedure provides that the court may, upon motion of either party, “amend its findings or make additional findings and may amend the judgment accordingly.” N.C. Gen. Stat. § 1A-1, Rule 52(b) (2009). Here, in response to the trial court’s order, plaintiff filed a motion pursuant to Rule 52 requesting that the trial court make “findings of fact and conclusions of law in addition to those previously made[.]” The trial court then amended its order to relieve plaintiff entirely of the memorandum of judgment and formal order. Defendant argues that

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this action by the trial court goes beyond making additional findings of fact under Rule 52(b), and thus exceeded the trial court's authority.

However, in plaintiff's motion, she requested that the court entirely set aside and relieve her of the memorandum of judgment and formal order. Thus, the trial court's action granted the relief sought by the motion, and amended its judgment and granted plaintiff the relief originally sought in her motion. This act was within the trial court's authority. The court may revisit its order and enter an amended order pursuant to Rule 60(b)(6)'s "grand reservoir of equitable power." *McGinnis v. Robinson*, 43 N.C. App. 1, 10, 258 S.E.2d 84, 89 (1979) (quotation marks and citation omitted); *see also Flinn v. Laughinghouse*, 68 N.C. App. 476, 478, 315 S.E.2d 72, 73 (1984) ("The broad language of Rule 60(b)(6) gives the court ample power to vacate judgments whenever such action is appropriate to accomplish justice.").

Defendant further argues that there was insufficient evidence introduced for the trial court to make additional findings of facts pursuant to Rule 52(b). However, Plaintiff included sufficient evidence in her motion for relief from judgment. This evidence included statements on the record by defendant's attorney stating that the Beneficial mortgage had been discharged and a copy of the deed of trust illustrating that Beneficial mortgage continues to have a lien on the property. These findings are thus deemed conclusive.

Affirmed.

Judges BRYANT and ERVIN concur.

PAULA DANCE, PLAINTIFF v. MAC MANNING, INDIVIDUALLY AND IN HIS CAPACITY AS SHERIFF OF PITT COUNTY; LEE MOORE; AND TRAVELERS COMPANIES, INC., AS SURETY FOR THE PITT COUNTY SHERIFF, DEFENDANTS

No. COA09-1402

(Filed 19 October 2010)

Appeal and Error— interlocutory order—denial of motion to admit pro hac vice attorney—no substantial right

Plaintiff's appeal from the trial court's denial of her motion for admission of an out-of-state attorney to practice *pro hac vice* was dismissed as interlocutory. The trial court's order did not

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involve a substantial right and was not appealable as a matter of right because parties do not have a right to be represented in the courts of North Carolina by counsel who are not duly licensed to practice in this state.

Appeal by plaintiff from order entered 8 May 2009 by Judge W. Russell Duke, Jr. in Superior Court, Pitt County. Heard in the Court of Appeals 14 April 2010.

Willie S. Darby, for plaintiff-appellant.

Cranfill Sumner & Hartzog, LLP, by Katie Weaver Hartzog, for defendants-appellees.

STROUD, Judge.

Paula Dance (“plaintiff”) appeals from a trial court’s denial of her motion for admission of an out-of-state attorney to practice *pro hac vice*. For the following reasons, we dismiss plaintiff’s interlocutory appeal.

Plaintiff, a former deputy sheriff in Pitt County, initially filed a complaint on 17 March 2008 against Pitt County; Mac Manning, individually and in his capacity as the Sheriff of Pitt County; and Lee Moore, individually and in his capacity as Chief Deputy Sheriff of Pitt County, alleging negligent infliction of emotional distress and “constructive discharge in violation of public policy[.]” On the same date, plaintiff also filed a motion seeking the admission of attorney Kimberly Tarver, from Baltimore, Maryland, to practice *pro hac vice*. After defendants filed motions to dismiss her complaint, plaintiff filed a voluntary dismissal without prejudice on 16 June 2008.

On 26 January 2009, plaintiff filed a new complaint against Mac Manning, individually and in his capacity as Sheriff of Pitt County; Lee Moore; and Travelers Companies, Inc., as surety for the Pitt County Sheriff, alleging negligent infliction of emotional distress, “common law obstruction of justice and civil conspiracy[.]” and “constructive discharge in violation of public policy[.]”¹ Plaintiff again filed a motion for admission of out-of-state Attorney Tarver to prac-

1. In their brief, defendants state that “[a]t the time of this appeal, Travelers Companies, Inc. had not been served with [this] Summons and Complaint, and therefore, is not a party to this appeal.” The record contains civil summons issued to defendants Manning and Moore but no summons issued to Travelers Companies, Inc. Plaintiff makes no argument that Travelers Companies, Inc. is a party to this appeal. As it appears that Travelers Companies, Inc. was not a party to the proceeding before the trial court, Travelers Companies, Inc. is not a party to this appeal.

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tice *pro hac vice* on 26 January 2009. After defendants filed an objection to plaintiff's motion for admission of an out-of-state attorney and a motion to dismiss in part, plaintiff filed a second motion for admission of an out-of-state attorney on 11 March 2009. By order dated 13 March 2009, the trial court denied plaintiff's first motion for admission of an out-of-state attorney to practice *pro hac vice*. Plaintiff filed a motion for "Recusal of Pitt County Resident Judges[.]" Defendants Mac Manning and Lee Moore filed their answer on 31 March 2009. By order dated 5 May 2009, the trial court denied plaintiff's second motion for admission of out-of-state attorney to practice *pro hac vice* and granted plaintiff's motion for recusal, but only as to Judge Duke, the presiding judge. Plaintiff filed notice of appeal from the trial court's 5 May 2009 order. On 1 February 2009, defendants filed a motion with this Court to dismiss plaintiff's appeal as interlocutory.

We first address defendants' motion to dismiss the appeal and plaintiff's grounds for appellate review. Plaintiff concedes that this appeal is not a final judgment but interlocutory. However, plaintiff, citing *Goldston v. American Motors Corp.*, 326 N.C. 723, 392 S.E.2d 735 (1990) and *Hagins v. Redevelopment Com. of Greensboro*, 275 N.C. 90, 165 S.E.2d 490 (1969), argues that her appeal is immediately appealable because it affects a "substantial right to select the attorney of her choice." We have held that

[a] final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy. An interlocutory order is generally not immediately appealable. Nonetheless, in two instances a party is permitted to appeal interlocutory orders. First, a party is permitted to appeal from an interlocutory order when the trial court enters a final judgment as to one or more but fewer than all of the claims or parties and the trial court certifies in the judgment that there is no just reason to delay the appeal. Second, a party is permitted to appeal from an interlocutory order when the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits. Under either of these two circumstances, it is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal and our Court's responsibility to review those grounds.

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Bullard v. Tall House Bldg. Co., — N.C. App. —, —, 676 S.E.2d 96, 103 (2009) (citations and quotation marks omitted).

Here, plaintiff's appeal is not a final judgment as the denial of her motion only addressed the issue of counsel for plaintiff but not the substantive claims made by plaintiff in her complaint. Therefore, plaintiff's appeal is interlocutory. The trial court made no certification in its judgment that there was no just reason for delay. Plaintiff simply asserts that she has a substantial right to be represented by out-of-state counsel, but our Courts have never held that this is true in all circumstances. In addressing the plaintiff's appeal from a trial court's denial of the plaintiff's motion for admission of counsel *pro hac vice*, this Court held that

such order does not involve a substantial right and is not appealable as a matter of right. This is so because parties do not have a right to be represented in the courts of North Carolina by counsel who are not duly licensed to practice in this state. Admission of counsel in North Carolina *pro hac vice* is not a right but a discretionary privilege. It is permissive and subject to the sound discretion of the Court.

Leonard v. Johns-Manville Sales Corp., 57 N.C. App. 553, 555, 291 S.E.2d 828, 829 (citations and quotation marks omitted), *disc. review denied*, 306 N.C. 558, 294 S.E.2d 371 (1982).

Plaintiff argues that in *Goldston v. American Motors Corp.*, the Supreme Court held that the plaintiff's interlocutory appeal should be considered as she had a substantial right to have her out-of-state attorney represent her in her lawsuit. 326 N.C. at 726, 392 S.E.2d at 736. However, in *Goldston*, the plaintiff's attorney "had been properly admitted *pro hac vice* under the statute and was actively involved in plaintiff's lawsuit" from 1986 until 1989, when he was removed as a result of a defendant's motion based upon allegations related to receipt of confidential information from a former employee of AMC. *Id.* at 727, 392 S.E.2d at 737. In addition, the plaintiff's attorney was an "alleged expert in cases of" the type brought by the plaintiff in *Goldston*, who had "years of experience and know-how" in lawsuits against "major manufacturers of jeeps and related vehicles for tort liability[.]" *Id.* The Court explained that "once the attorney was admitted under the statute, plaintiff acquired a substantial right to the continuation of representation by that attorney—just as with any other attorney duly admitted to practice law in the State of North Carolina." *Id.* However, this Court has recognized that *Goldston* "involved litigation that had been ongoing for several years and an attorney who had a national reputation in handling

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products liability cases against a particular defendant,” distinguishing *Goldston* from a case in which the “litigation is still in its infancy, and plaintiffs’ counsel does not hold any unique expertise that cannot be found elsewhere in our state bar.” *Smith v. Beaufort County Hosp. Ass’n, Inc.*, 141 N.C. App. 203, 216, 540 S.E.2d 775, 783 (2000), *aff’d per curiam*, 354 N.C. 212, 552 S.E.2d 139 (2001).

In her brief, plaintiff argues further that the trial court’s denial of the admission of Attorney Tarver “is in effect a revocation of her admission” since she had previously filed another lawsuit arising from the same events and in which Attorney Tarver was admitted to practice *pro hac vice*. However, here plaintiff had filed a voluntary dismissal of her first lawsuit; *Goldston* dealt with the removal of counsel in ongoing litigation where the counsel was properly admitted at the inception of his representation in that same lawsuit. 326 N.C. at 727, 392 S.E.2d at 737. When a plaintiff files a voluntary dismissal, “ ‘it [is] as if the suit had never been filed.’ ” *Barham v. Hawk*, 165 N.C. App. 708, 719, 600 S.E.2d 1, 8 (2004) (quoting *Tompkins v. Log Systems, Inc.*, 96 N.C. App. 333, 335, 385 S.E.2d 545, 547 (1989), *disc. review denied*, 326 N.C. 366, 389 S.E.2d 819 (1990)). Any orders entered in the first lawsuit have no relevance to the newly filed lawsuit, as the dismissal “ ‘carries down with it previous rulings and orders in the case.’ ” *Id.* (quoting *Gibbs v. Carolina Power & Light Co.*, 265 N.C. 459, 464, 144 S.E.2d 393, 398 (1965)).

Here, Attorney Tarver was never admitted *pro hac vice* in the current lawsuit and plaintiff has not demonstrated that she was actively involved in ongoing litigation on plaintiff’s behalf for several years or that she has any special expertise required for plaintiff’s representation in this case, so we hold that *Goldston* is inapplicable to the case before us. We also find *Hagins v. Redevelopment Com. of Greensboro*, 275 N.C. 90, 165 S.E.2d 490 (1969), inapplicable as it does not address an interlocutory appeal or the issue of admission of an out-of-state counsel to practice in this State *pro hac vice*.

As plaintiff’s interlocutory appeal does not affect a substantial right, we grant defendant’s motion and dismiss plaintiff’s appeal.

DISMISSED.

Judges McGEE and HUNTER, JR., Robert N. concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 19 OCTOBER 2010)

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| BEAR v. EXOTIC IMPS., INC. No. 10-95 | Dare (09CVS621) | Affirmed |
| GARCIA v. HUFFBO, LLC No. 09-1657 | NC Industrial Commission (635388) | Remanded |
| IN RE C.O.H. No. 09-1652 | Transylvania (08JB07) | No Error |
| ROLLINS v. TYCO ELECS. No. 10-294 | NC Industrial Commission (547454) | Affirmed |
| SPRUILL v. N.C. DEPT OF AGRIC. No. 09-1581 | NC Industrial Commission (559533) | Affirmed |
| STATE v. CHESTER No. 10-116 | Caldwell (09CRS50465) | Affirmed |
| STATE v. CLARY No. 09-1628 | Alamance (08CRS57560-63) | 08CRS05756051-SBM enrollment order vacated. 08CRS05756052- Sex Offender registration order and SBM enrollment order vacated |
| STATE v. DAVIS No. 09-1348 | Wayne (06CRS56066-68) | No Error |
| STATE v. EDWARDS No. 10-137 | Guilford (08CRS97426-27) (08CRS97429-30) (05CRS102097) (09CRS24169-70) | No Error |
| STATE v. HAZELTON No. 10-70 | Buncombe (09CRS51028) | No Error |
| STATE v. HENSLEY No. 09-1689 | Buncombe (08CRS19439) | No Error |
| STATE v. JONES No. 10-43 | Forsyth (07CRS53442) | No Error |

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| STATE v. MOCK No. 09-1600 | Iredell (07CRS60284) (08CRS55016) (08CRS55013) (07CRS60281) (08CRS55014) | Affirmed |
| STATE v. SMITH No. 09-1397 | Sampson (06CRS53284) (06CRS53148) | No Error |
| STATE v. WHITE No. 10-212 | Wake (09CRS40318) | No Error in part; Judgment Arrested in part; Dismissed in part |
| THOMPSON v. ARAMARK, INC. No. 10-246 | NC Industrial Commission (742391) | Dismissed |
| WATSON-GREEN v. WAKE CNTY. BD. OF EDUC. No. 09-530 | Wake (08CV520) | Affirmed |
| WEBB v. WEBB No. 09-1203 | Alamance (02CVD2363) | Affirmed in part; Remanded in part |
| WEYANT v. JOHNSTON CNTY. BD. OF EDUC. No. 09-1408 | Johnston (09CVS442) | Dismissed |
| WHD, L.P. v. LAWYERS MUT. LIAB. INS. CO. No. 09-1633 | Wake (08CVS7293) | Affirmed |

NEWCOMB v. CNTY. OF CARTERET

[207 N.C. App. 527 (2010)]

ROBERT TIMBERLAKE NEWCOMB, III, SCOTT D. NAFE, GARY T. DAVIS, AND WIFE, KAREN J. DAVIS, AND PELHAM JONES, PLAINTIFFS V. COUNTY OF CARTERET, UNITED STATES OF AMERICA, GEORGE BROWN, JULIAN M. BROWN, JULIAN BROWN, JR., EARL CHADWICK, TEMPLE CHADWICK, GLORIA DAVIS, RANDY FRYE, NORMAN FULCHER, JOE O'NEAL GARNER, ROBERT GUTHRIE, SAMMY GUTHRIE, GRAY HARRIS, MAUREEN HARRIS, MYRON HARRIS, TAMMY HILL, DAVID N. JONES, LARRY KELLUM, LARRY KELLUM, JR., ROBERT KITTRELL, LEE LAWRENCE, D.A. LEWIS, JEFF LEWIS, MARK LEWIS, THOMAS LEWIS, AND WIFE, DENISE LEWIS, LUKE MIDGETT, RANDY STEVE MILAM, JR., LARRY MOORE, CHARLES NEWKIRK, CRAIG NEWKIRK, BECKY PAUL, THE ANNIE PINER FAMILY LIMITED PARTNERSHIP, ROSALIE CHADWICK PINER, TIMMY POTTER, NINO GIOVANNI PUPATTI, LUTHER ROBINSON, KENNY RUSTICK, THOMAS ALLEN SMITH, THOMAS ALLEN SMITH, JR., JEFFREY TAYLOR, SAMUEL THOMAS AND WIFE CYNTHIA THOMAS, SUSANNE WHITE, KEVIN WILLIAMSON, SONNY WILLIAMSON, MELVIN WILLIS, TERRY WILLIS, ROBERT WAYNE WORKMAN, JR., DEFENDANTS

No. COA09-1254

(Filed 2 November 2010)

1. Waters and Adjoining Lands— creation of harbor—riparian rights

In a case arising from the creation of Marshallberg Harbor, the trial court correctly granted summary judgment for plaintiffs on riparian rights issues. The extent to which plaintiffs had riparian rights in Marshallberg Harbor did not hinge upon whether the harbor was natural or manmade; given that Marshallberg Harbor was clearly capable of navigation by watercraft, the owners of property bordering the harbor clearly have riparian rights in its waters.

2. Appeal and Error— appealability—amended summary judgment order—certification added—beyond correction of clerical error—writ of certiorari granted

The trial court lacked the authority to amend its summary judgment order to add a certification allowing immediate appeal through reliance on its authority to correct clerical errors under N.C.G.S. § 1A-1, Rule 60(a). The appeal from this portion of the summary judgment order was dismissed, but the record and briefs were treated as a petition for *certiorari*, which was granted.

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[207 N.C. App. 527 (2010)]

3. Easements— construction of harbor—control of permanent structures

The trial court correctly concluded that Carteret County had the right to control installation and repair of permanent structures in Marshallberg Harbor where the original easement granted broad and unambiguous rights to the County with the intention that the Harbor function as a public rather than a private asset, and a subsequent easement to the federal government for construction of the Harbor did not disturb those rights.

4. Appeal and Error— denial of summary judgment—prescriptive easement

Plaintiffs were not entitled to seek immediate appellate review of the trial court's decision to deny them summary judgment on a prescriptive easement issue as a matter of right. Further, plaintiffs' request for a writ of *certiorari* was denied.

Appeal by certain defendants and cross-appeal by plaintiffs from Order entered 9 March 2009 by Judge Russell J. Lanier, Jr., in Carteret County Superior Court. Heard in the Court of Appeals 23 February 2010.

Ward and Smith, P.A., by Ryal W. Tayloe, for plaintiff-cross appellants/appellees Scott D. Nafe, Gary T. Davis, Karen J. Davis, and Pelham Jones.

Harvelland Collins, P.A., by Wesley A. Collins, for plaintiff-cross appellants/appellees Robert Timberlake Newcomb, III, Gary T. Davis, Karen J. Davis, and Pelham Jones.

Chesnutt, Clemmons, Peacock & Long, P.A., by Gary H. Clemmons, for defendants-appellants/appellees George Brown, Julian M. Brown, Julian Brown, Jr., Earl Chadwick, Temple Chadwick, Randy Frye, Norman Fulcher, Joe O'Neal Gardner, Robert Guthrie, Sammy Guthrie, Maureen Harris, Tammy Hill, Larry Kellum, Larry Kellum, Jr., Robert Kittrell, Lee Lawrence, D.A. Lewis, Jeff Lewis, Mark Lewis, Thomas Lewis, Denise Lewis, Luke Midgett, Randy Steve Milam, Jr., Larry Moore, Charles Newkirk, Craig Newkirk, Becky Paul, Nino Giovanni Pupatti, Luther Robinson, Kenny Rustick, Thomas Allen Smith, Thomas Allen Smith, Jr., Jeffrey Taylor, Kevin Williamson, Sonny Williamson, Melvin Willis, Terry Willis, and Robert Wayne Workman, Jr.

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Wheatly, Wheatly, Weeks & Lupton, P.A., by Claud R. Wheatly, III, for defendant-appellee Carteret County.

ERVIN, Judge.

Defendants George Brown, Julian M. Brown, Julian Brown, Jr., Earl Chadwick, Temple Chadwick, Randy Frye, Norman Fulcher, Joe O’Neal Gardner, Robert Guthrie, Sammy Guthrie, Maureen Harris, Tammy Hill, Larry Kellum, Larry Kellum, Jr., Robert Kittrell, Lee Lawrence, D.A. Lewis, Jeff Lewis, Mark Lewis, Thomas Lewis, Denise Lewis, Luke Midgett, Randy Steve Milam, Jr., Larry Moore, Charles Newkirk, Craig Newkirk, Becky Paul, Nino Giovanni Pupatti, Luther Robinson, Kenny Rustick, Thomas Allen Smith, Thomas Allen Smith, Jr., Jeffrey Taylor, Kevin Williamson, Sonny Williamson, Melvin Willis, Terry Willis, and Robert Wayne Workman, Jr. (Joint Individual Defendants) appeal and Plaintiffs Robert Timberlake Newcomb, III, Scott D. Nafe, Gary T. Davis, and wife, Karen J. Davis, and Pelham Jones cross-appeal from an order entered by the trial court granting partial summary judgment in favor of Plaintiffs with respect to the issue of whether Plaintiffs had riparian rights into Marshallberg Harbor; denying Plaintiffs’ request for summary judgment with respect to the issue of whether Plaintiffs’ properties were subject to certain prescriptive easements applicable to various roadways, parking areas and paths; and construing certain easements to afford Defendant Carteret County the responsibility for overseeing the installation and use of permanent structures in Marshallberg Harbor and to require Carteret County to serve as an arbiter with respect to any disputes over the installation and use of such structures. After careful consideration of the various challenges to the trial court’s summary judgment order that have been advanced by the Joint Individual Defendants and Plaintiffs in light of the record and the applicable law, we conclude that Plaintiffs’ appeal from the trial court’s decision concerning the prescriptive easement issue should be dismissed and that the remainder of the trial court’s order should be affirmed.

I. Factual Background

A. Substantive Facts

Marshallberg is an unincorporated community located at the eastern end of Carteret County on a peninsula that is “bounded on the east by Core Sound, on the south by The Straits, and on the west by Sleepy

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Creek.” Marshallberg presently has a population of approximately 528 people. The mainstays of Marshallberg’s economy and culture include commercial fishing and boat building.

On or about 28 June 1948, the Chief Engineer of the United States Army submitted a report, which was printed as part of House Document No. 68 in the 1st Session of the 81st Congress, concerning whether it was advisable to provide “harbor improvements at and in the vicinity of Marshallberg” in connection with an existing waterway project from Pamlico Sound to Beaufort Harbor, North Carolina, by way of Core Sound. On 17 May 1950, Congress passed the River and Harbor Act of 1950 (“Waterway From Pamlico Sound to Beaufort Harbor, N.C.-Harbor Improvement at Marshallberg”), which authorized construction of an approach channel and harbor in Marshallberg in accordance with the project outlined in House Document No. 68.

In House Document No. 68, the Board of Engineers recommended that the existing waterway project be modified “to provide for a harbor 6 feet deep, 100 feet wide, and about 600 feet long in the natural drain between the mouth of Sleepy Creek and the surfaced highway at Marshallberg, with an approach channel of the same depth, 60 feet wide, from the 6-foot contour in The Straits, near the public dock, to the entrance of Sleepy Creek and thence to the harbor” One of the principal justifications for the project described in House Document No. 68 was the creation of a harbor to protect the boats in the area from “sustain[ing] considerable damage during storms in seeking refuge in the shallow waters of Sleepy Creek.” However, House Document No. 68 also indicated that the construction of the proposed harbor was justified for the purpose of inducing more commercial fishermen to visit the area, reducing the time needed to travel to the fishing grounds, providing for the centralized harboring of boats, and alleviating potential malarial conditions. According to House Document No. 68, the improvements were “necessary for the safety and convenience of established and prospective navigation.” The Board of Engineers’ recommendation that the Marshallberg Harbor project be approved was conditioned upon assurances from “responsible local interests” that they would “(a) [p]rovide without cost to the United States all lands, easements, rights-of-way, and spoil-disposal areas necessary for the construction of the project and subsequent maintenance, when and as required; (b) hold and save the United States free from all damages due to the construction and subsequent maintenance of the project; and (c) provide

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at their own expense suitable space for public landing open to all on equal terms.” According to House Document No. 68, the construction of the proposed harbor was to be accompanied by various improvements to be provided by the local community in the form of “an access walkway, stalls for tying up boats, and a public landing[.]”

In order to satisfy these conditions, various property owners and Carteret County granted certain easements which facilitated the completion of the project. The three easements provided, in pertinent part, as follows:

1. On 19 October 1956, various land owners, who owned “certain lands in the community of Marshallberg . . . upon which or through which the United States Government proposes to construct a small boat harbor for the boat owners of the people of Marshallberg, and any and all other boat owners desiring to use same,” “in order to bring about the completion of such a project, with full realization as to the benefit to be received thereby, not only to the said land owners, but to the community and county as well, and [with] full knowledge and recognition that these benefits far exceed the granting and giving of an easement over their lands for said purpose,” conveyed “unto the County of Carteret . . . a perpetual right and easement, said easement to include the right to have all necessary dredged materials deposited upon the lands herein affected, all without further charge to the United States Government, to said county, later to be assigned, transferred or reconveyed to the United States Government, to dredge and construct a channel from the Straits channel, or Core Sound, into and up Sleepy Creek, and into and upon the lands belonging to the” grantors.

2. On 25 October 1956, Carteret County, in light of the fact that the tract of land covered by the easement “is needed in the construction of” “a channel in Sleepy Creek from Core Sound and a connecting harbor at Marshallberg,” and “in consideration of the sum of One (\$1.00) Dollar, the receipt of which is hereby acknowledged, and the benefits that will result and accrue to the County of Carteret,” conveyed “the perpetual rights and easement to enter unto, dig, or cut away any or all of the hereinbefore described tract or land as may be required for the construction and maintenance of the [harbor project] or any enlargement thereof, and to maintain the portion cut away and removed, as part of the navigable waters of the United States.”

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3. On 1 June 1957, a number of individuals who owned property bordering “on the boat basin at Marshallberg” “subject to existing easements . . . for a boat basin and other utilities,” conveyed “the perpetual rights and easements to enter upon, use, manage, improve and maintain any or all of the hereinbefore described tract of land for a public landing open to all on equal terms in accordance with the provisions of the project set forth in” House Document No. 68.

After obtaining the necessary easements, the United States Army Corps of Engineers (USACE) constructed Marshallberg Harbor in the late 1950s.

Prior to the construction of the harbor, the property in question was essentially undeveloped. The area in which Marshallberg Harbor is now located originally consisted of a cove at the mouth of Sleepy Creek. On its east end, near Marshallberg Road, the property consisted of pasture, water and myrtle bushes, and honeysuckle. On the west end, near the Straits and Sleepy Creek, the land became wetter, with marsh grass, mutton grass, and mud predominating. The property served as a drainage area for run-off from the west end of Marshallberg, with a three foot drainage ditch running from Marshallberg Road to the marshy area.

After its construction, Marshallberg Harbor has been used by the Joint Individual Defendants and others, including members of the general public, for various purposes. Following the completion of construction, the Marshallberg community installed a bulkhead at the head of the harbor, removed the spoils, graded the banks, and took other actions intended to facilitate use of the harbor. Many of these activities were organized and undertaken in earlier years by the Marshallberg Community Men’s Club. After 1997, the Marshallberg Community Club, Inc., contributed time and money for the purpose of replacing the bulkhead, installing street lights around the harbor and paying the associated monthly fees, installing a “flapper” to improve drainage at the head of the harbor, grading and otherwise improving the roads around the harbor, installing ropes and poles at the head of the harbor, and undertaking other actions to improve the harbor’s appearance. The Joint Individual Defendants and other Marshallberg residents have built and maintained docks in the harbor and walkways around its perimeter which have been used by a variety of persons. In the early years after the construction of the harbor, some individuals sought and obtained approval from the surrounding landowners before building docks and

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similar facilities in the harbor. Subsequently, however, individuals constructed facilities in the harbor without obtaining permission from the surrounding landowners to do so.

B. Procedural History

On 26 July 2005, Plaintiffs¹ filed a complaint against Carteret County, the United States, and numerous individual Defendants, some of whom owned property in the vicinity of Marshallberg Harbor and some of whom used facilities in Marshallberg Harbor without owning any adjacent property, alleging that the easements described in more detail above were granted to the United States for the sole purpose of permitting the initial construction and continued maintenance of Marshallberg Harbor, that the easements did not grant any right of access to Marshallberg Harbor to any person other than Carteret County and the United States or allow any person to go on Plaintiffs' private property for the purpose of accessing Marshallberg Harbor, that the easements did not "confer upon any individual or entity the right to moor or dock boats in Plaintiffs' riparian corridor or otherwise interfere with the riparian rights of Plaintiffs," that the easements "do not confer upon [any person] or entity the right to build any improvement, including docks or piers, upon the property of Plaintiffs," and that the easements did not "restrict the riparian rights of Plaintiffs . . . to improve their respective property in any way, including the demolition, construction, installation, and maintenance of piers, docks and other structures and improvements within Plaintiffs' . . . riparian corridors." As a result, Plaintiffs requested that the court enjoin "all Defendants . . . (a) from entering upon the lands of Plaintiffs, including Plaintiffs' riparian corridors out into Marshallberg Harbor, for any purpose[;]" (b) "from entering upon the lands of Plaintiffs, including Plaintiffs' riparian corridors out into Marshallberg Harbor, for the purpose of gaining access to boats or other vessels in Marshallberg Harbor and/or the docks or piers located adjacent to Plaintiffs' property that extend into Marshallberg Harbor;" (c) "from trespassing upon the lands of Plaintiffs or interfering with Plaintiffs' property rights in any way, including Plaintiffs' riparian rights;" and (d) "from docking or anchoring boats within Plaintiffs' riparian corridors," and require "all Defendants to remove any boats, vessels, or other items of personal property from Plaintiffs' property and from Plaintiffs' riparian corridors."

1. Plaintiffs own certain tracts of property that adjoin Marshallberg Harbor, although other persons own property adjoining the harbor as well.

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On 15 August 2005, 18 August 2005, 29 August 2005, 21 September 2005, and 23 September 2005, respectively, Carteret County; Defendants Samuel and Cynthia Thomas;² the United States; Defendants David N. Jones, Susanne White, and Gloria Davis;³ and the Joint Individual Defendants⁴ filed answers to Plaintiffs' complaint in which they admitted the existence of a dispute over the meaning of the easements that resulted in the construction of Marshallberg Harbor.⁵ In addition, the Joint Individual Defendants moved to dismiss Plaintiffs' complaint for lack of subject matter jurisdiction and failure to state a claim for which relief could be granted, denied the material allegations of Plaintiffs' complaint, requested the Court to adopt a different construction of the relevant easements than that advocated for by Plaintiffs, and asserted a number of affirmative defenses, including the public trust doctrine, the existence of certain implied and prescriptive easements, and the creation of certain neighborhood public roads or public roads by prescription or implied dedication.⁶

On 1 March 2006, Judge Benjamin G. Alford heard the dismissal motions filed by the Joint Individual Defendants. On 24 April 2006, Plaintiffs moved to amend their complaint. On 28 April 2006, Judge Alford entered an order denying Plaintiffs' amendment motion and the Joint Individual Defendants' dismissal motions. Although the Joint Individual Defendants noted an appeal from Judge Alford's order, this Court dismissed their appeal as having been taken from an unappealable interlocutory order on 1 May 2007. *Newcomb v. Cty. of Carteret*, 183 N.C. App. 142, 145-46, 643 S.E.2d 669, 670-71 (2007).

2. Defendants Samuel and Cynthia Thomas own real property adjacent to Marshallberg Harbor and filed an answer that requests relief consistent with that sought by Plaintiffs.

3. Defendants David N. Jones, Susanne White, and Gloria Davis own real property adjacent to Marshallberg Harbor and filed an answer in which they admitted the material allegations of Plaintiffs' complaint and requested the court to enter a judgment declaring the rights of the parties.

4. Although Defendant Timmy Potter joined the answer filed by the Joint Individual Defendants, he is no longer represented by counsel for the Joint Individual Defendants and is not participating in this appeal.

5. At various points during the course of the proceedings in the Superior Court, Plaintiffs voluntarily dismissed their claims against Defendants Annie Piner Family Limited Partnership and Gary Harris.

6. Defendant Myron Harris is deceased, and no party has been substituted in his place.

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On 8 August 2007 and 9 August 2007, respectively, Carteret County and the Joint Individual Defendants filed motions seeking the entry of summary judgment. The Joint Individual Defendants' summary judgment motion was accompanied by affidavits from numerous individuals, including most of the Joint Individual Defendants.⁷ These affidavits described the ownership of the land beneath Marshallberg Harbor, the steps that had been taken to ensure free access to Marshallberg Harbor, the use that the affiants had made of Marshallberg Harbor, the docks that had been constructed in Marshallberg Harbor, and the "roads" and paths that ran around Marshallberg Harbor. In response, Plaintiffs filed an affidavit from Plaintiff Pelham T. Jones on 16 August 2007 discussing the condition of the property on which Marshallberg Harbor was built prior to the construction of that facility. On 20 August 2007, the Joint Individual Defendants filed additional affidavits from Julian M. Brown, Sr., and David Allen Lewis describing the condition of the land on which Marshallberg Harbor was built prior to the construction of the harbor, the steps that had been taken to resist Plaintiffs' claim to have the right to exclude other individuals from obtaining access to Marshallberg Harbor across Plaintiffs' properties, and the nature of the use made of Marshallberg Harbor by non-residents.

On 21 August 2007, the trial court heard argument on the pending summary judgment motions. On 16 January 2009, Plaintiffs filed a calendaring request seeking the entry of an order ruling on the pending summary judgment motions. On 20 January 2009, the Joint Individual Defendants filed a motion requesting the trial court to certify any order ruling on the parties' summary judgment motions for immediate review pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b). On 26 January 2009,⁸ the trial court entered an order deciding the pending summary judgment motions. In its order, the trial court determined:

7. The Joint Individual Defendants filed affidavits executed by Trudy Beveridge, Julian M. Brown, Sr., Julian M. Brown, Jr., George Ashley Brown, Earl McDonald Chadwick, Temple Strong Chadwick, Norman Leslie Fulcher, Joseph O. Garner, Robert Wayne Guthrie, Sammy Lee Guthrie, Maureen Harris, Larry Gray Kellum, Sr., Larry Gray Kellum, Jr., Robert Davis Kittrell, Kevin Lee Lawrence, David Allen Lewis, Denise Davis Lewis and Thomas Brian Lewis, Jeffrey Wayne Lewis, Mark E. Lewis, Luke B. Midgett, III, Larry Gordon Moore, Arthur Craig Newkirk, Charles M. Newkirk, Rebecca Brown Paul, Nino Pupati, Luther James Robinson, Kenneth E. Rustick, Thomas Allen Smith, Thomas Allen Smith, Jr., Clifford (Sonny) Williamson, Kevin Glen Williamson, Melvin Gordon Willis, and Terry Douglas Willis.

8. According to the record, the proceedings in this case were effectively suspended with the consent of the parties during the period of time between the hearing on the parties' summary judgment motions and the entry of the trial court's order ruling on those motions.

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1. That there is no genuine issue of material fact on the claim by the Plaintiffs of the existence of riparian rights appurtenant to the properties of the Plaintiffs and other landowners abutting Marshallberg Harbor and that Plaintiffs are entitled to judgment as a matter of law declaring that they have riparian rights into Marshallberg Harbor as an incident of their ownership of properties abutting the Harbor, subject to the easements of the County as hereinafter set forth;

2. That there is no genuine issue of material fact as to the easement rights of the County of Carteret pursuant to those easements dated October 19, 1956, and recorded in Book 173, Page 352, Carteret County Registry, and June 1, 1957, recorded in Book 179, Page 109, Carteret County Registry, respectively, and the County is entitled to judgment as a matter of law as to such easement rights as hereinafter set forth; and

3. That there are genuine issues of material fact as to the claim of the [Joint Individual] Defendants for a public prescriptive easement over the roadways, parking areas, and pathways on or across the lands of the Plaintiffs and other landowners who abut the harbor, and neither Plaintiffs nor Defendants are entitled to judgment as a matter of law on that issue.

4. Pursuant to [Rule 54(b)], the Court finds, and hereby certifies, that, although there remain pending claims, as to the claim that Plaintiffs are entitled to judgment as a matter of law declaring that they have riparian rights into the Marshallberg Harbor as an incident of their ownership of properties abutting the Harbor, subject to the easements of Carteret County, said claim is final and that there exists no just reason for delay.

Based upon these determinations, the trial court ordered that:

1. It is hereby declared and decreed that Plaintiffs and the other property owners whose property abuts Marshallberg Harbor, their heirs, successors and assigns, have riparian rights appurtenant to their properties and as an incident of the ownership of such properties into Marshallberg Harbor, subject to the easements of the County of Carteret dated October 19, 1956, and recorded in Book 173, Page 352, Carteret County Registry, and June 1, 1957, recorded in Book 179, Page 109, Carteret County Registry, respectively.

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2. The County of Carteret, by virtue of the aforesaid easements recorded in Book 173, Page 352 and Book 179, Page 109, Carteret County Registry, has the right to control the demolition, removal, repair, erection, installation, and use made of any docks, mooring stakes, anchorages, berths, or any permanent structure in the harbor, giving due regard to the riparian rights of the Plaintiffs and the other property owners whose property abuts the harbor, and such reasonable uses as the Plaintiffs and the other property owners whose property abuts the harbor may seek to make of their riparian rights; and the right of the public and all boat owners and boaters to use the waters of the harbor consistent with the purpose and intent of the harbor as expressed in its enabling statute, the River and Harbor Act of 1950 (“Waterway from Pamlico Sound to Beaufort Harbor, NC—Harbor Improvement at Marshallberg”), House Document No. 68, 81st Congress, 1st Session. The County of Carteret shall be the arbiter of any dispute concerning the demolition, removal, repair, erection, installation, and use made of any docks, mooring stakes, anchorages, berths, or any permanent structure in the harbor between the owners of property abutting the harbor, now and in the future, and the boaters, the general public, and others as disputes may arise.

3. That the Motion of the [Joint Individual] Defendants for Summary Judgment and the [] request by Plaintiffs for Summary Judgment [pursuant to N.C. Gen. Stat. § 1A-1, Rule 56(c)] on the issue of the [Joint Individual] Defendants’ claimed public prescriptive easement over the roadways, parking areas, and pathways on or across the lands of the Plaintiffs and other property owners abutting the harbor shall be, and hereby are, denied. That the Motion of the [Joint Individual] Defendants for Summary Judgment [] as to the Plaintiffs’ claims for riparian rights to the Marshallberg Harbor, subject to the easements of the County of Carteret, shall be, and is, hereby, denied.

4. At the hearing on the Motions for Summary Judgment, the [Joint Individual] Defendants conceded that such roadways of the harbor (Milton Willis Lane and the dirt/shell road adjacent to Plaintiff Newcomb’s property[]) are not “neighborhood public roads” as originally claimed, and Plaintiffs are therefore entitled to judgment as a matter of law on this issue such that such claim shall be, and it is hereby, dismissed, with prejudice.

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5. Pursuant to [Rule 54(b)], the Court hereby certifies as final the Plaintiffs' claim and the Court's Order that they are entitled to riparian rights to the Marshallberg Harbor as an incident of their ownership of properties abutting the Harbor, subject to the easements of Carteret County, as set forth in paragraph 1 and as referenced in paragraph (2) of the Order section of this Order, and further certifies that there exists no just reason for a delay on the ruling of Plaintiffs' claims by the Court, and therefore said claim and ruling thereon is immediately appealable to the North Carolina Court of Appeals.

On 23 February 2009, the Joint Individual Defendants noted an appeal to this Court from that portion of the trial court's summary judgment order that determined that "Plaintiffs and the other property owners whose property abuts Marshallberg Harbor, their heirs, successors and assigns, have riparian rights appurtenant to their properties and as an incident of the ownership of such properties into Marshallberg Harbor" On 4 March 2009, Plaintiffs noted a cross-appeal to this Court from that portion of the trial court's order (1) awarding Carteret County "the right to control the demolition, removal, repair, erection, installation, and use made of any docks, mooring stakes, anchorages, berths, or any permanent structure in the harbor" and making Carteret County "the arbiter of any dispute concerning the demolition, removal, repair, erection, installation, and use made of any docks, mooring stakes, anchorages, berths, or any permanent structure in the harbor between the owners of property abutting the harbor, now and in the future, and the boaters, the general public, and others as disputes may arise" and (2) denying Plaintiffs' request for summary judgment pursuant to Rule 56(c), with respect to "the issue of the [Joint Individual] Defendants' claimed public prescriptive easement over the roadways, parking areas, and pathways on or across the lands of the Plaintiffs and other property owners abutting the harbor" On 9 March 2009, the trial court, acting on its own motion, entered an order amending the 26 January 2009 summary judgment order pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(a) (2009). The 9 March 2009 amendment certified as final that portion of the trial court's order finding that Carteret County had the right to control permanent structures in Marshallberg Harbor, determined that "there exist[ed] no just reason for a delay on the ruling of [this] claim[] by the Court," and stated that the trial court's ruling on this claim should be "immediately appealable to the North Carolina Court of Appeals" as authorized by Rule 54(b). On 6 April 2009, the Joint Individual Defendants noted an appeal to this

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Court seeking review of that portion of the trial court's amended summary judgment order relating to the riparian rights issue in light of the trial court's decision to amend the summary judgment order to certify an additional issue pursuant to Rule 54(b). On 13 April 2009, Plaintiffs noted a cross-appeal from that portion of the trial court's amended summary judgment order awarding Carteret County control over permanent structures in Marshallberg Harbor and making Carteret County "the arbiter of any dispute concerning" such structures in light of the trial court's decision to amend the summary judgment order to certify an additional issue pursuant to Rule 54(b). With certain limited exceptions, the trial court stayed further proceedings and the enforcement of the substantive provisions of the summary judgment order pending the completion of proceedings in the appellate division.

II. Legal Analysis

A. Appealability

The summary judgment order was "made during the pendency of an action [and does] not dispose of the case, but instead leave[s] it for further action by the trial court . . . to settle and determine the entire controversy." *Carriker v. Carriker*, 350 N.C. 71, 73, 511 S.E.2d 2, 4 (1999) (citing *Veazey v. City of Durham*, 231 N.C. 357, 361, 57 S.E.2d 377, 381 (1950)). Since the trial court's decision to deny summary judgment with respect to the issue of the validity of "the [Joint Individual] Defendants' claimed public prescriptive easement over the roadways, parking areas, and pathways on or across the lands of the Plaintiffs and other property owners abutting the harbor" compels the conclusion that further proceedings must necessarily occur in the Carteret County Superior Court before the entry of final judgment in this case, the trial court's summary judgment order is clearly interlocutory in nature.

As a general matter, "there is no right of immediate appeal from interlocutory orders and judgments." *Travco Hotels, Inc. v. Piedmont Natural Gas Co., Inc.*, 332 N.C. 288, 291, 420 S.E.2d 426, 428 (1992) (citing *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990)). The general rule precluding immediate appellate review of interlocutory orders is intended "to prevent fragmentary and premature appeals that unnecessarily delay the administration of justice and to ensure that the trial divisions fully and finally dispose of the case before an appeal can be heard," *Bailey v. Gooding*, 301 N.C. 205, 209, 270 S.E.2d 431, 434 (1980) (citations omitted), and rests on the understanding that "[t]here is no more effective way to procrastinate the

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administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders.” *Veazey*, 231 N.C. at 363, 57 S.E.2d at 382. However, immediate appellate review of interlocutory orders is available “when the trial court enters a final judgment as to one or more, but fewer than all, claims or parties and certifies there is no just reason for delay” pursuant to Rule 54(b), or when the interlocutory order affects a substantial right under N.C. Gen. Stat. § 1-277(a) (2009) and N.C. Gen. Stat. § 7A-27(d) (2009). *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) (citing *DKH Corp. v. Rankin-Patterson Oil Co.*, 348 N.C. 583, 585, 500 S.E.2d 666, 668 (1998); *Oestreicher v. Am. Nat’l Stores*, 290 N.C. 118, 121-22, 225 S.E.2d 797, 800 (1976), *abrogated in part by Lovick v. Farris*, 2009 N.C. App. LEXIS 686 (2009)). Therefore, we must consider the extent, if any, to which each of the challenged components of the trial court’s summary judgment order is properly before the Court in order to evaluate the issues presented for our consideration on appeal.

B. Summary Judgment Standard of Review

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009). In reviewing an order granting summary judgment, our task is to “determine, on the basis of the materials presented to the trial court, whether there is a genuine issue as to any material fact and whether the moving party is entitled to judgment as a matter of law.” *Coastal Plains Utils., Inc. v. New Hanover Cty.*, 166 N.C. App. 333, 340, 601 S.E.2d 915, 920 (2004) (citing *Oliver v. Roberts*, 49 N.C. App. 311, 314, 271 S.E.2d 399, 401 (1980), *cert. denied*, 276 S.E.2d 283 (1981)). “All inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the party opposing the motion.” *Boudreau v. Baughman*, 322 N.C. 331, 343, 368 S.E.2d 849, 858 (1988) (citing *Page v. Sloan*, 281 N.C. 697, 706, 190 S.E.2d 189, 194 (1972)). A trial court’s decision granting a summary judgment motion is reviewed on a *de novo* basis. *Virginia Elec. & Power Co. v. Tillett*, 80 N.C. App. 383, 385, 343 S.E.2d 188, 191, *cert. denied*, 317 N.C. 715, 347 S.E.2d 457 (1986).

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C. Substantive Legal Issues1. Riparian Rights

[1] First, the Joint Individual Defendants argue that the trial court erred by concluding that Plaintiffs have riparian rights in Marshallberg Harbor. The Joint Individual Defendants contend that riparian rights only attach to natural, as compared to artificial, bodies of water and that, since Marshallberg Harbor was constructed in the 1950s, it is not a natural waterway in which adjoining property owners are entitled to have riparian rights. Based upon controlling authority from this Court, however, we disagree with the Joint Individual Defendants' contention.⁹

“Riparian rights are vested property rights that arise out of ownership of land bounded or traversed by navigable water.” *Pine Knoll Ass'n v. Cardon*, 126 N.C. App. 155, 159, 484 S.E.2d 446, 448 (citing *In re Protest of Mason*, 78 N.C. App. 16, 337 S.E.2d 99 (1985), *disc. review denied*, 315 N.C. 588, 341 S.E.2d 27 (1986) *disc. review denied*, 347 N.C. 138, 492 S.E.2d 26 (1997)). “ [A]ll watercourses are regarded as navigable in law that are navigable in fact.” *Gwathmey v. State of North Carolina*, 342 N.C. 287, 300, 464 S.E.2d 674, 682 (1995) (quoting *State v. Baum*, 128 N.C. 600, 604, 38 S.E. 900, 901 (1901)). For that reason, riparian rights are available to the owners of property that are adjacent to or encompass bodies of water that are navigable in fact. The riparian rights available to the owners of property “bounded or traversed by water” are derived from “two distinct properties: 1) the principal estate of land extending to the shoreline of [the body of water in question], and 2) the appurtenant estate of submerged land in [the body of water in question] benefitting the principal estate.” *Weeks v. N.C. Dep't. of Nat. Res. and Cmty. Dev.*, 97 N.C. App. 215, 225, 388 S.E.2d 228, 234 (citing *Capune v. Robbins*, 273 N.C. 581, 588, 160 S.E.2d 881, 886 (1968), *disc. review denied*, 326 N.C. 601, 393 S.E.2d 890 (1990)). According to well-established North Carolina law, riparian owners have “a qualified property in the water frontage belonging, by nature, to their land, the chief advantage growing out of the appurtenant estate in the submerged land being the right of access over an extension of their water fronts to nav-

9. As a result of the fact that the trial court's order represents a final judgment with respect to the Plaintiffs' claim to have riparian rights into Marshallberg Harbor and the fact that the trial court certified that there was “no just reason for delay” with respect to this claim, N.C. Gen. Stat. § 1A-1, Rule 54(b), the Joint Individual Defendants' challenge to this portion of the trial court's summary judgment order is properly before this Court on appeal.

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igable water, and the right to construct wharves, piers, or landings” *Bond v. Wool*, 107 N.C. 126, 129, 12 S.E. 281, 284 (1890).

Although Defendants argue that riparian rights only attach to natural, as compared to artificial, bodies of water, this Court has recently concluded, in the context of applying the “public trust” doctrine,¹⁰ that “[t]he fact that a waterway is artificial, not natural,” does not determine the extent to which a body of water is navigable. *Fish House, Inc. v. Clarke*, — N.C. App. —, —, 693 S.E.2d 208, 211, *disc. review denied*, — N.C. —, — S.E.2d —, 2010 N.C. Lexis 596 (2010) (quoting *Hughes v. Nelson*, 303 S.C. 102, 105, 399 S.E.2d 24, 25 (1990)). Instead, this Court stated that “the controlling law of navigability concerning the body of water ‘in its natural condition’ reflects only upon the manner in which the water flows without diminution or obstruction,” so that “any waterway, whether manmade or artificial, which is capable of navigation by watercraft constitutes ‘navigable water’ under the public trust doctrine of this state.” *Id.* at —, 693 S.E.2d at 212. Given that the concept of “navigability” as used in the “public trust” and the riparian rights contexts is identical, and the fact that this Court has rejected the distinction upon which the Joint Individual Defendants rely in the “public trust” context, we hold that the trial court correctly concluded that the extent to which Plaintiffs have riparian rights in Marshallberg Harbor does not hinge upon whether the harbor was natural or manmade. In addition, given that Marshallberg Harbor is clearly “capable of navigation by watercraft,” the owners of property bordering the harbor clearly have riparian rights in its waters. As a result, we conclude that the trial court did not err by granting summary judgment in favor of Plaintiffs with respect to the riparian rights issue.¹¹

10. According to the “public trust” doctrine, “the lands under navigable waters ‘are held in trust by the State for the benefit of the public’ and ‘the benefit and enjoyment of North Carolina’s submerged lands is available to all its citizens.’” *Parker v. New Hanover Cty.*, 173 N.C. App. 644, 653, 619 S.E.2d 868, 875 (2005) (quoting *State ex rel. Rohrer v. Credle*, 322 N.C. 522, 527, 369 S.E.2d 825, 828 (1988)). See also N.C. Gen. Stat. § 1-45.1 (2009) (providing the protections available under the “public trust” doctrine extend to “the right to navigate, swim, hunt, fish, and enjoy all recreational activities in the watercourses of the State”).

11. In addition to challenging the extent to which Plaintiffs were entitled to riparian rights into Marshallberg Harbor, the Joint Individual Defendants have also advanced an argument relating to the nature and extent of any riparian rights that might be available to Plaintiffs. However, given that the trial court’s summary judgment order does not address this issue and given that our decision with respect to the extent of Carteret County’s authority over permanent structures in Marshallberg Harbor effectively addresses the issues raised by the Joint Individual Defendants’ alternative argument,

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2. Carteret County's Right to Control Marshallberg Harbor

In its summary judgment order, the trial court ruled that Plaintiffs' riparian rights were "subject to the easements of the County" and that the easements recorded at Book 173, Page 352, and Book 179, Page 109, in the Carteret County Registry gave Carteret County "the right to control the demolition, removal, repair, erection, installation, and use made of any docks, mooring stakes, anchorages, berths, or any permanent structures in the harbor" and made Carteret County "the arbiter of any dispute concerning the demolition, removal, repair, erection, installation, and use made of any docks, mooring stakes, anchorages, berths, or any permanent structure in the harbor between the owners of property abutting the harbor, now and in the future, and the boaters, the general public, and others as disputes may arise." On appeal, Plaintiffs contend that this portion of the trial court's summary judgment order was in error because the easements in question did not grant any such authority to Carteret County. We disagree.

a. Appealability

[2] The trial court did not certify the issue of Carteret County's right to control permanent structures in Marshallberg Harbor for immediate review in its initial summary judgment order. However, in its amended summary judgment order, the trial court attempted to add a certification relating to this issue in apparent reliance on its authority to correct clerical errors under N.C. Gen. Stat. § 1A-1, Rule 60(a). A careful review of the relevant authorities establishes that the trial court lacked the authority to amend its summary judgment order in this fashion.

N.C. Gen. Stat. § 1A-1, Rule 60(a), "provides a limited mechanism for trial courts to amend erroneous judgments." *Pratt v. Staton*, 147 N.C. App. 771, 774, 556 S.E.2d 621, 623 (2001). More specifically, N.C. Gen. Stat. § 1A-1, Rule 60(a), provides that:

[c]lerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the judge at any time on his own initiative or on the motion of any party and after such notice, if any, as the judge orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate divi-

there is no need for us to acquiesce in the Joint Individual Defendants' request that we determine the extent of Plaintiffs' riparian rights in addition to ascertaining whether such rights exist.

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sion, and thereafter while the appeal is pending may be so corrected with leave.

The trial court's amended summary judgment order did not simply correct a clerical error in the original summary judgment order. Instead, the amended summary judgment order worked a substantive modification to the initial summary judgment order. " 'A change in an order is considered substantive and outside the boundaries of [N.C. Gen. Stat. § 1A-1,] Rule 60(a) when it alters the effect of the original order.' " *Pratt*, 147 N.C. App. at 774, 556 S.E.2d at 624 (*quoting Buncombe Cty. ex rel. Andres v. Newburn*, 111 N.C. App. 822, 825, 433 S.E.2d 782, 784, *disc. review denied*, 335 N.C. 236, 439 S.E.2d 143 (1993)). In concluding that a trial court lacked the authority to modify a prior order dismissing certain claims asserted in the plaintiffs' complaint in reliance upon Rule 60(a), for the purpose of adding a certification pursuant to Rule 54(b), this Court stated that:

by adding the trial court's Rule 54(b) certification and establishing grounds for immediate appellate review of an otherwise interlocutory order, the trial court's 10 October 2000 amended order, likewise "altered the substantive rights of the parties." . . . [T]he amended order in the instant case allowed plaintiffs to circumvent the established procedural rules governing the bringing of an appeal and secure appellate review of an otherwise unappealable order. Accordingly, we hold that [N.C. Gen. Stat. § 1A-1,] Rule 60(a) is not an appropriate means for seeking an amendment to an order or judgment to add the trial court's . . . certification [pursuant to Rule 54(b)].

As in *Pratt*, the trial court in this case lacked the authority to use Rule 60(a) to add a certification pursuant to Rule 54(b) to the initial summary judgment order because that action altered the substance of the initial order. Plaintiffs vigorously contend that the Joint Individual Defendants consented to the inclusion of a certification pursuant to Rule 54(b), with respect to the issue of Carteret County's right to control permanent structures in Marshallberg Harbor and that the Joint Individual Defendants have suffered no prejudice as a result of the trial court's action. However, the limitations on a trial court's authority to amend orders pursuant to Rule 60(a), are jurisdictional in nature, *In re C.N.C.B.*, — N.C. App. —, —, 678 S.E.2d 240, 243 (2009) (stating that, "[b]ecause the trial court was without jurisdiction pursuant to [N.C. Gen. Stat. § 1A-1,] Rule 60(a)[,] to add the omitted finding of fact, the corrected order must be vacated"), and cannot be overlooked on the grounds of consent, *Dep't. of Transp. v. Tilley*, 136 N.C. App. 370,

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374, 524 S.E.2d 83, 86 (stating that “[d]efendants correctly point out that subject matter jurisdiction cannot be consented to or stipulated to”) (citing *Stanley, Edwards, Henderson v. Dep’t. of Conservation and Dev.*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973), *disc. review denied*, 351 N.C. 640, 543 S.E.2d 868, *cert. denied*, 531 U.S. 878, 148 S.E.2d 129, 121 S. Ct. 186 (2000)), or lack of prejudice. Thus, the trial court lacked the authority to amend the original summary judgment order for the purpose of certifying additional issues for immediate appeal pursuant to Rule 54(b).

As we read the record, Plaintiffs have not cited any alternative basis for the assertion of our appellate jurisdiction over this issue. Further, we do not read Plaintiffs’ *certiorari* petition to encompass that portion of the trial court’s order addressing the County’s authority over the harbor. As a result, we are compelled to grant the Joint Individual Defendants’ motion to dismiss Plaintiffs’ appeal from that portion of the trial court’s summary judgment order addressing the extent of Carteret County’s authority over the permanent structures in Marshallberg Harbor.

Although we have dismissed Plaintiffs’ appeal relating to the “harbor control” issue, we conclude that we will grant *certiorari* on our own motion to permit us to address this question on the merits. We have made this determination for a number of related reasons, including the fact that the parties apparently did agree, at one point, that it would be advantageous for this Court to consider both the issue of whether Plaintiffs had riparian rights into Marshallberg Harbor and the extent to which the County was entitled to control permanent structures in Marshallberg Harbor in the course of an interlocutory appeal from the trial court’s summary judgment order, the fact that the Joint Individual Defendants addressed the extent of Plaintiffs’ riparian rights in Marshallberg Harbor (a subject which the trial court attempted to resolve by construing the easements originally granted in connection with the construction of Marshallberg Harbor so as to provide that Carteret County would have control over permanent structures in the harbor) in their challenge to the trial court’s summary judgment order, and the fact that consideration of this issue on the merits at this time will expedite the ultimate disposition of this case. As a result, we hereby treat the record and briefs as a petition for the issuance of a writ of *certiorari* directed toward the issue of Carteret County’s role in the operation of Marshallberg Harbor pursuant to N.C.R. App. P. 21(a)(1) (2010) and grant that petition.

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b. Construction of Easements

[3] The extent to which Carteret County is entitled to control permanent structures in Marshallberg Harbor and to serve as the arbiter of disputes arising from such structures hinges upon the proper interpretation of the easements granted in connection with the harbor's construction. Thus, in order to decide whether the trial court properly granted summary judgment in favor of Carteret County with respect to this issue, we must examine the 19 October 1956 easement from certain landowners to Carteret County and the 25 October 1956 easement from Carteret County to the United States.¹² "An easement deed, such as the one in the case at bar, is, of course, a contract." *Weyerhaeuser Co. v. Carolina Power & Light Co.*, 257 N.C. 717, 719, 127 S.E.2d 539, 541 (1962).

Deeds of easement are construed according to the rules for construction of contracts so as to ascertain the intention of the parties as gathered from the entire instrument at the time it was made. When "there is any doubt entertained as to the real intention," the court should construe the deed of easement with "reason and common sense" and adopt the interpretation which produces the usual and just result.

Brown v. Weaver-Rogers Assocs., Inc., 131 N.C. App. 120, 122, 505 S.E.2d 322, 324 (1998), *disc. review denied*, 350 N.C. 92, 532 S.E.2d 523 (1999) (citations omitted); see also *Lovin v. Crisp*, 36 N.C. App. 185, 189, 243 S.E.2d 406, 409 (1978) (stating that the intention of the parties is to be gathered from "the instrument in its totality") (quoting *Reynolds v. Sand Co.*, 263 N.C. 609, 139 S.E.2d 888 (1965)). When deciding the scope of an easement, "consideration must be given to the purposes for

12. As should be obvious from an examination of the textual discussion, we agree with Plaintiffs that the 1 June 1957 easement, which grants Carteret County the right "to enter upon, use, manage, improve and maintain" a tract of land located at the head of Marshallberg Harbor "for a public landing open to all on equal terms," has no bearing on the extent, if any, to which the 19 October 1956 and 25 October 1956 easements authorize Carteret County to supervise permanent structures located in the harbor. As a result of our conclusion that the 1 June 1957 easement has no effect on the extent of Carteret County's role in the ongoing regulation of Marshallberg Harbor, we need not address Plaintiffs' contention that the trial court impermissibly expanded the authority granted by the 1 June 1957 easement to include all of Marshallberg Harbor. Instead, we will examine the issues raised by Plaintiffs' challenge to this portion of the trial court's summary judgment order on the basis of an analysis of the relevant easements. *Strickland v. Hedrick*, 194 N.C. App. 1, 22, 669 S.E.2d 61, 75 (2008) (stating that "[a]ssuming *arguendo* that the trial court's reasoning . . . was incorrect, we are not required on this basis alone to determine that the ruling was erroneous" and that "[t]he question for review is whether the ruling of the trial court was correct") (quoting *State v. Austin*, 320 N.C. 276, 290, 357 S.E.2d 641, 650, *cert. denied*, 484 U.S. 916, 98 L. Ed. 2d 224, 108 S. Ct. 267 (1987). 108 S. Ct. 267 (1987).

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which the easement was granted.” *Shingleton v. State*, 260 N.C. 451, 457, 133 S.E.2d 183, 187 (1963) (citing *Sparrow v. Tobacco Co.*, 232 N.C. 589, 61 S.E.2d 700 (1950)). In ascertaining “the intention of the parties as of the time the contract was made,” “consideration must be given to the purpose to be accomplished, the subject-matter of the contract, and the situation of the parties.” *Weyerhaeuser*, 257 N.C. at 719, 127 S.E.2d at 541 (citing *DeBruhl v. Highway Comm’n*, 245 N.C. 139, 144-45, 95 S.E.2d 553, 557 (1956)). In the event that the language of an easement “is clear and unambiguous, effect must be given to its terms, and the court, under the guise of construction, cannot reject what the parties inserted or insert what the parties elected to omit.” *Id.* (citing *Hartford Accident & Indem. Co. v. Hood*, 226 N.C. 706, 710, 40 S.E.2d 198, 201-02 (1946)); see also *Stonecreek Sewer Ass’n v. Gary D. Morgan Developer, Inc.*, 179 N.C. App. 721, 730, 635 S.E.2d 485, 491 (2006) (stating that, in the event that the easement is precisely described, “the plain language . . . and terms control”) (citing *Williams v. Abernethy*, 102 N.C. App. 462, 464-65, 402 S.E.2d 438, 440 (1991), *disc. review denied*, 361 N.C. 227, 643 S.E.2d 400 (2007)). If, on the other hand, the language in which the easement is couched is ambiguous, it “‘may be interpreted by reference to the attendant circumstances, to the situation of the parties, and especially to the practical interpretation put upon the grant by the acts of the parties in the use of the easement immediately following the grant.’” *Williams*, 102 N.C. App. at 465, 402 S.E.2d at 440 (quoting 2 G. Thompson, *Commentaries on the Modern Law of Real Property* § 385, at 528).¹³ Since an easement holder “may neither change the easement’s purpose nor expand the easement’s dimensions,” *Bunn Lake Prop. Owner’s Ass’n. v. Setzer*, 149 N.C. App. 289, 296, 560 S.E.2d 576, 581 (2002) (citations omitted), he or she “‘must not change the use for which the easement was created so as to increase the burden of the servient tract.’” *Swaim v. Simpson*, 120 N.C. App. 863, 864, 463 S.E.2d 785, 787 (1995) (quoting I. Patrick K. Hetrick & James B. McLaughlin, Jr., *Webster’s Real Estate Law in North Carolina* § 15-21 (4th Ed. 1994)), *aff’d*, 343 N.C. 298, 469 S.E.2d 553 (1996).

13. Although the Joint Individual Defendants correctly note that references to other deeds or maps in a deed are properly considered for purposes of construing that instrument, *Kelly v. King*, 225 N.C. 709, 716, 36 S.E.2d 220, 224 (1945), we do not believe, as the Joint Individual Defendants contend, that the application of this principle to the facts of this case results in the incorporation of House Document No. 68 in its entirety into the deeds of easement that are at issue here. Although we agree that a map referenced in the record as Map. No. PSB-90 would be incorporated into the deeds of easement based on the principal upon which the Joint Individual Defendants rely, we do not believe that consideration of that map has added materially to our analysis of the issues in dispute between the parties.

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The 19 October 1956 easement grants “a perpetual right and easement, said easement to include the right to have all necessary dredged materials deposited upon the lands herein affected, all without further charge to the United States Government, to [Carteret County], later to be assigned, transferred or reconveyed to the United States Government, to dredge and construct a channel from the Straits channel, or Core Sound, into and up Sleepy Creek, and into and upon the lands belonging to the undersigned, and to dredge and construct a basin or boat harbor” as shown on Map No. PSB-90. The deed in question specifically states that the United States “proposes to construct a small boat harbor for the boat owners of the people of Marshallberg and any and all other boat owners desiring to use same” and that it was “necessary to obtain from [the] owners [of the land upon which the harbor was to be built] an easement or right-of-way for the purpose of said construction, as well as later maintenance.” In granting this easement, the landowners expressly stated a desire to cooperate with “the completion of such a project, with full realization as to the benefit to be received thereby, not only to the said land owners, but to the community and county as well”

Plaintiffs argue on appeal, based on the language in the 19 October 1956 easement, that “it is the practice of the United States Government to have land owners, in matters of this kind, convey directly to the county in which the development or project is located, the county in such cases later conveying to the United States Government;” other statements in the easement referring to the role of the United States in constructing the harbor; and the fact that the easement grants rights to Carteret County, “later to be assigned, transferred or reconveyed to the United States Government, to” construct the proposed harbor, that it is “clear that it is the United States, not the County, that is in charge of the Harbor project” (emphasis in the original) and “is to retain the rights granted under the Easement.” The upshot of Plaintiffs’ position concerning the proper construction of the 19 October 1956 easement is that the easement “is limited to the right to dredge the land and construct the channel and Harbor” and “contains no language giving the County any other rights” We do not, however, find this logic persuasive.

Plaintiffs’ reading of the 19 October 1956 easement ignores the presence of language clearly establishing that the construction of Marshallberg Harbor was intended to serve public, rather than private, interests. The proposed harbor could only serve the public, as compared to a private, interest in the event that some entity had the right to ensure that the harbor functioned as a public, rather than a private,

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asset. For that reason, Plaintiffs' argument is inconsistent with the clear language of the 19 October 1956 easement describing the overarching purpose of the Marshallberg Harbor project. In addition, the literal language of the 19 October 1956 easement indicates that the rights granted to Carteret County "include[d] the right to have all necessary dredged materials deposited upon the lands herein affected" "later to be assigned, transferred or reconveyed to the United States Government," for the purpose of constructing the necessary harbor facilities. The presence of the word "include" indicates that the right to "have all necessary dredged materials deposited upon the lands herein" was only part of the rights granted pursuant to the 19 October 1956 easement. On the contrary, the clearly expressed purpose sought to be achieved by the granting of the 19 October 1956 easement was the construction and operation of a harbor "for the boat owners of the people of Marshallberg and any and all other boat owners desiring to use same," an end which could not be achieved solely through the construction and maintenance of a physical facility. The language of the 19 October 1956 easement does not in any way limit the rights granted to Carteret County in order to permit the achievement of that purpose. As a result, after carefully examining the language of that portion of the 19 October 1956 easement, we are convinced that the relevant language does not purport to require the transfer of the entire collection of rights created by the original easement from Carteret County to the United States, but rather contemplates the transfer of the right to "have all necessary dredged materials deposited upon the lands herein affected" so that the United States could "dredge and construct a channel from the Straits channel, or Core Sound, into and up Sleepy Creek, and into and upon the lands belonging to the undersigned, and to dredge and construct a basin or boat harbor . . ." Since all of the rights granted by the easement were not to be transferred from Carteret County to the United States, the parties clearly contemplated that the County would retain the rights that were not to be subsequently conveyed to the United States. As a result, we are not persuaded that the language of the 19 October 1956 easement should be construed in the narrow manner advocated by Plaintiffs and believe, instead, that the 19 October 1956 easement should be construed to grant Carteret County the rights necessary to permit the construction, maintenance, and oversight of a small boat harbor for the use of the Marshallberg community and the general public.

The language of the 25 October 1956 easement between Carteret County and the United States confirms our interpretation of the 19 October 1956 easement. According to the 25 October 1956 easement,

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Carteret County conveyed to the United States “the perpetual rights and easement to enter unto, dig, or cut away any or all of the [real property described in the 25 October 1956 easement] as may be required for the construction and maintenance of the aforesaid work or improvement or any enlargement thereof, and to maintain the portion cut away and removed, as part of the navigable waters of the United States.” As we understand this language, which does not purport to convey all of the rights granted to Carteret County in the 19 October 1956 easement to the United States, the United States obtained the rights necessary to construct and physically maintain Marshallberg Harbor. However, nothing in the language of the 25 October 1956 easement in any way indicates that Carteret County gave up any right that it had to oversee Marshallberg Harbor stemming from the 19 October 1956 easement, particularly given that the provisions of the 25 October 1956 easement granting the United States certain maintenance rights are not explicitly exclusive. Thus, we do not construe the 25 October 1956 easement as stripping Carteret County of any rights that it may have obtained under the 19 October 1956 easement for the purpose of overseeing the proposed harbor in the interests of the public.

In urging us to reach a contrary conclusion, Plaintiffs point to language in the 25 October 1956 easement requiring “local interests [to] furnish free of cost to the United States of America all necessary rights-of-way for the said improvement,” note that the 25 October 1956 easement granted Carteret County “perpetual easements thereon for the purpose of executing and carrying out the aforesaid improvements,” and remind us that Carteret County conveyed to the United States the “perpetual rights and easement to enter unto, dig, or cut away any or all of the hereinbefore described tract or land as may be required for the construction and maintenance of the aforesaid work or improvement or any enlargement thereof, and to maintain the portion cut away and removed” In addition, Plaintiffs point out that the 25 October 1956 easement does not contain any language reserving any rights to Carteret County. Plaintiffs’ arguments in reliance upon the language of the 25 October 1956 easement are not persuasive.

Nothing in the language of the 25 October 1956 easement purports to strip Carteret County of any rights granted under the 19 October 1956 easement. On the contrary, the fact that the United States obtained the right to construct Marshallberg Harbor on the property specified in the 25 October 1956 easement does not in any way preclude Carteret County from exercising any rights available to it under the 19 October 1956 easement. In other words, we do not believe that the 25 October

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1956 easement conveyed all of Carteret County's easement rights to the United States. Instead, we conclude that the 25 October 1956 easement simply authorized the United States to take certain actions while leaving the rights granted to Carteret County under the 19 October 1956 easement intact.

Thus, for the reasons set forth above, we conclude that the 19 October 1956 easement gave Carteret County broad rights relating to the construction, maintenance, and oversight of Marshallberg Harbor and that nothing in the 25 October 1956 easement stripped Carteret County of those rights. The rights granted to Carteret County under the 19 October 1956 easement were necessary to ensure that Marshallberg Harbor served "boat owners of the people of Marshallberg and any and all other boat owners desiring to use the" harbor. In view of the broad and unambiguous rights granted to Carteret County under the 19 October 1956 easement and the fact that those rights were not disturbed by the 25 October 1956 easement, we conclude that the trial court correctly construed the relevant easements to provide that Carteret County "ha[d] the right to control the demolition, removal, repair, erection, installation, and use made of any docks, mooring stakes, anchorages, berths, or any permanent structure in the harbor" and should serve as "arbiter of any dispute concerning the demolition, removal, repair, erection, installation, and use made of any docks, mooring stakes, anchorages, berths, or any permanent structure in the harbor between the owners of property abutting the harbor, now and in the future, and the boaters, the general public, and others as disputes may arise."¹⁴

3. Prescriptive Easement

[4] The second issue which Plaintiffs seek to raise on appeal stems from the trial court's refusal to grant summary judgment on the prescriptive easement issue. As we have already concluded, the trial court's summary judgment order is interlocutory in nature. Thus, in resolving Plaintiffs' challenge to the trial court's refusal to grant summary judgment in their favor with respect to the prescriptive easement issue, we must first address the extent, if any, to which this component of the trial court's summary judgment order is immediately appealable.

The trial court correctly refrained from certifying the prescriptive easement issue for immediate review pursuant to Rule 54(b), given that

14. In view of the fact that our decision with respect to the "harbor control" issue is based exclusively on what we believe to be the clear and unambiguous meaning of the 19 October 1956 and 25 October 1956 deeds of easement, we have not considered any evidence extrinsic to those documents in making our decision.

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a refusal to grant summary judgment is not, as a general proposition, a final judgment with respect to a particular claim or party. In addition, Plaintiffs have wisely refrained from arguing that the trial court's refusal to grant their motion for summary judgment with respect to the prescriptive easement issue affected a substantial right given this Court's decision that a party's right to hold property free from such an encumbrance does not affect such a right. *Miller v. Swann Plantation Dev. Co.*, 101 N.C. App. 394, 396, 399 S.E.2d 137, 139 (1991) (stating that "[w]e simply fail to see how defendants' claimed right to hold title to the property free from [an] encumbrance 'will clearly be lost or irremediably adversely affected' if the order is not reviewed before final judgment") (quoting *Blackwelder v. Dept. of Human Resources*, 60 N.C. App. 331, 335, 299 S.E.2d 777, 780 (1983)). Instead, Plaintiffs argue that the relevant portion of the trial court's summary judgment order is immediately appealable based on principles such as those enunciated in *Moses v. State Highway Comm'n*, 261 N.C. 316, 317, 134 S.E.2d 664, 665 (stating "when, as here, the parties desire an answer to a question which is fundamental in determining their rights, is also of public importance, and when decided will aid State agencies in the performance of their duties, we will in the exercise of the supervisory jurisdiction given us, answer the question") (citations omitted), *cert. denied*, 379 U.S. 930, 13 L. Ed. 2d 342, 85 S. Ct. 327 (1964)). See also *Edwards v. City of Raleigh*, 240 N.C. 137, 139, 81 S.E.2d 273, 275 (1954), *Stanback v. Stanback*, 287 N.C. 448, 453, 215 S.E.2d 30, 34 (1975) (stating that appellate courts will review trial court orders "not otherwise appealable, when such review will serve the expeditious administration of justice;" that "[s]uch discretion is not intended to displace the normal procedures of appeal, but inheres to appellate courts under our supervisory power to be used only in those rare cases in which normal rules fail to administer to the exigencies of the situation;" and that, "[w]hen discretionary review is allowed, the question of appealability becomes moot") (citing *Howland v. Stitzer*, 240 N.C. 689, 692, 84 S.E.2d 167, 170 (1954); *Ward v. Martin*, 175 N.C. 287, 289-90, 95 S.E. 621, 623 (1918); *Wachovia Bank & Tr. Co. v. Morgan*, 9 N.C. App. 460, 466, 176 S.E.2d 860, 864 (1970); 2 McIntosh, *North Carolina Practice and Procedure* § 1782(7) (Phillips Supp. 1970); and *Furr v. Simpson*, 271 N.C. 221, 222-23, 155 S.E.2d 746, 748 (1967)). However, as the citations to *Edwards*, 240 N.C. at 139, 81 S.E.2d at 275 (referring to the Supreme Court's authority "to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts'") (quoting N.C. Const. Art. IV, sec. 8), and *Furr*, 271 N.C. at 223, 155 S.E.2d at 748 (stating that "[a]ppellee's contention that this appeal should be dismissed as

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premature . . . is rendered feckless by our order allowing *certiorari*") (citing *Williams v. Bd. of Educ.*, 266 N.C. 761, 764, 147 S.E.2d 381, 383 (1966)), make clear, the principles upon which Plaintiffs rely do not constitute separate grounds for assuming appellate jurisdiction over appeals from interlocutory orders, but rather refer to this Court's authority to issue a writ of *certiorari* in order to permit review of interlocutory orders that are not appealable as a matter of right. N.C. Gen. Stat. § 7A-32(c) (2009). As a result, Plaintiffs are not entitled to seek immediate appellate review of the trial court's decision with respect to the prescriptive easement issue as a matter of right and must instead rely on their alternative request for the issuance of a writ of *certiorari*.

In seeking the issuance of a writ of *certiorari*, Plaintiffs argue that the prescriptive easement issue involves important questions of considerable interest to the public, that the prescriptive easement issue is inexorably intertwined with the other issues that are before the Court, and that a decision in their favor with respect to this issue would expedite the final resolution of this case. On the other hand, the Joint Individual Defendants, in opposing Plaintiffs' *certiorari* petition, emphasize that immediate appellate review of a trial court's order denying summary judgment should only be afforded in "extraordinary circumstances," *Moore v. Moody*, 304 N.C. 719, 720, 285 S.E.2d 811, 812 (1982), and argue that there is nothing "extraordinary" about the trial court's refusal to grant summary judgment with respect to the prescriptive easement issue. We agree with the Joint Individual Defendants.

The issues raised by Plaintiffs' challenge to the trial court's ruling on the prescriptive easement issue are exceedingly fact-intensive in nature. As the voluminous record that has been presented to us establishes, a proper determination of the correctness of the trial court's ruling would require consideration of a large amount of information concerning events and conditions at Marshallberg Harbor over an extended period of time. In our judicial system, most factual determinations are reserved for juries; the ultimate effect of the trial court's decision is to leave resolution of this issue for the jury, which will be able to hear all relevant witnesses and make any necessary credibility determinations. We do not find any of Plaintiffs' arguments in favor of departing from our general practice of declining to review most orders denying requests for summary judgment on an interlocutory basis to be persuasive. Although, as Plaintiffs point out, a decision in their favor on the prescriptive easement issue would end the present litigation, similar considerations would support the issuance of a writ of *certiorari* in virtually any case in which a trial court refuses to grant summary judgment.

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In addition, while there can be no doubt that the public interest will almost always be served by the expeditious resolution of litigation, there are benefits to be obtained from the fuller development of the record available as the result of the examination and cross-examination of witnesses. Furthermore, the routine allowance of interlocutory appeals would have a tendency to delay, rather than advance, the ultimate resolution of matters in litigation. *Veazey*, 231 N.C. at 363, 57 S.E.2d at 382. Finally, we are not persuaded that the factual matters that must be examined in order to resolve the prescriptive easement issue in this case are so inextricably intertwined with the other issues that are before the Court on appeal that proceeding to decide whether the trial court properly denied summary judgment with respect to the prescriptive easement issue would be advisable. Thus, for all of these reasons, we conclude, in the exercise of our discretion, that Plaintiffs' request for *certiorari* review of the prescriptive easement issue should be denied.

III. Conclusion

As a result, we conclude that the trial court correctly granted summary judgment in Plaintiffs' favor with respect to the riparian rights issue and in favor of Carteret County with respect to the question of how issues related to permanent structures in Marshallberg Harbor should be decided. In addition, we conclude that Plaintiffs do not have the right to appeal from the trial court's refusal to grant summary judgment with respect to the prescriptive easement issue as a matter of right and that Plaintiffs' request for the issuance of a writ of *certiorari* concerning that issue should be denied. Thus, the trial court's summary judgment order should be, and hereby is, affirmed in part and Plaintiffs' appeal from the trial court's refusal to grant summary judgment with respect to the prescriptive easement issue should be, and hereby is, dismissed.

AFFIRMED IN PART; DISMISSED IN PART.

Judges HUNTER and GEER concur.

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MLC AUTOMOTIVE, LLC; AND LEITH OF FAYETTEVILLE, INC., PLAINTIFFS v. TOWN OF SOUTHERN PINES; THE SOUTHERN PINES TOWN COUNCIL; AND FRANK QUIS, DAVID WOODRUFF, FRED WALDEN, CHRISTOPHER SMITHSON AND MICHAEL HANEY, DEFENDANTS

No. COA09-433

(Filed 2 November 2010)

1. Zoning— rezoning—auto park—common law vested right— failure to show substantial expenditures in good faith reliance on governmental approval

The trial court erred in a zoning case by granting summary judgment in favor of plaintiffs on their claim of a common law vested right to develop an auto park notwithstanding the rezoning of the pertinent property. Plaintiffs did not make substantial expenditures in good faith reliance on governmental approval of their proposed automobile dealership project. The case was remanded for entry of summary judgment in favor of defendants.

2. Zoning— rezoning—tortious interference with contract— tortious interference with prospective economic gain—failure to show lack of justification

The trial court did not err in a zoning case by granting summary judgment in favor of defendants on plaintiffs' claims for tortious interference with contract and tortious interference with prospective economic advantage. Plaintiffs failed to present any evidence that defendants acted without justification in rezoning the property in accordance with its statutory authority.

Appeal by plaintiffs and defendants from order entered 12 November 2008 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 28 October 2009.

Poyner Spruill, LLP, by Cecil W. Harrison, Jr. and Chad W. Essick; and Currin & Currin, by Robin Tatum Currin, for plaintiffs.

Cranfill Sumner & Hartzog LLP, by Susan K. Burkhart, for defendants.

GEER, Judge.

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This appeal arises out of a zoning dispute between plaintiffs, Leith of Fayetteville, Inc. and MLC Automotive, LLC, and defendants, the Town of Southern Pines (“the Town”), the Southern Pines Town Council, and individual Council members (Frank Quis, David Woodruff, Fred Walden, Christopher Smithson, and Michael Haney). Plaintiffs purchased a parcel of land in the Town and made initial preparations to develop it for use as an auto park, a use permitted in the zoning classification that applied to the property at the time of plaintiffs’ purchase. After plaintiffs began the process to obtain the required permits, the Town rezoned the property—the new classification no longer permitted motor vehicle sales.

Plaintiffs sued defendants for tortious interference with contract and tortious interference with prospective economic advantage. They also claimed to have a common law vested right to develop the auto park on the property. The trial court granted summary judgment to defendants on plaintiffs’ tort claims, but granted summary judgment to plaintiffs on the common law vested right claim. Both sides appealed.

We affirm the trial court’s grant of summary judgment to defendants on the tort claims. Plaintiffs failed to present any evidence that defendants acted without justification in rezoning the property—an essential element of both tort claims. We, however, reverse the trial court’s grant of summary judgment to plaintiffs on their claim of a common law vested right since plaintiffs did not make substantial expenditures in good faith reliance on government approval of their proposed automobile dealership project.

Facts

In 2000, plaintiffs, who are in the business of developing and operating automobile dealerships, became interested in purchasing a 21-acre tract of land near the intersection of U.S. Highway 1 and N.C. Highway 2 in the Town of Southern Pines, North Carolina. Plaintiffs intended to develop an auto park consisting of several dealerships. This property was zoned General Business (“GB”), and, at the time, the Town’s Unified Development Ordinance (“UDO”) provided that property in districts zoned as GB could be used for “Motor Vehicle and Boat Sales or Rental or Sales and Service” without a special or conditional use permit.

On 28 June 2001, the Code Enforcement Officer for the Town sent a letter to Jim Murray, a resident of Pinehurst, explaining that a car dealership can be located in the GB district so long as all zoning requirements are met. On 30 November 2001, the Code Enforcement Officer

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responded to an inquiry by Danny Howell of Raleigh, acknowledging that the property at issue in this case was located in the GB zoning district, and automobile sales were a permitted use in the GB district.

Plaintiffs purchased the property for \$1,553,904.00 in January 2002. Between 2001 and 2005, plaintiffs spent an additional \$518,156.00 in preparations to develop the property. In January 2005, plaintiffs entered into a letter of intent (“LOI”) with American Suzuki Motor Corporation (“Suzuki”). Pursuant to the LOI, plaintiffs agreed to construct an automobile sales, service, and parts facility on the property in accordance with the agreed upon terms and conditions set out in the LOI. In exchange, upon completion of the facility, Suzuki agreed to issue plaintiffs a Dealership Agreement for one year.

Plaintiffs hired William G. Daniel & Associates, P.A. to perform site design services for the property, which included investigating the regulatory requirements pertaining to construction of the auto park. In January 2005, Daniel met with Bart Nuckols, the Town Planning Director, to discuss the plans for the auto park. At this meeting, Nuckols explained to Daniel that under the UDO, in order to proceed with the development of the property, plaintiffs needed a zoning/building permit. Nuckols told Daniel that the Town’s zoning permit and building permit procedure was a unitary procedure and that there was a checklist of items that had to be completed before an application for a zoning/building permit could be submitted and reviewed.

In support of their motion for summary judgment, defendants filed an affidavit by Nuckols stating that since at least 1990, “the Town has issued unitary zoning/building permits for proposed construction in the Town.” According to Nuckols, the Town uses a “unified” or “combined” zoning/building permit, which “has a blank for indicating the appropriate zoning compliance and is signed by the Zoning Officer when the zoning is determined to be appropriate. The Town does not issue a separate permit to indicate zoning compliance.”

Daniel testified that Nuckols told him that plaintiffs had to obtain an architectural compliance certificate from the Town Council before moving forward with the other steps on the checklist. Nuckols, however, in his deposition, denied making that statement.

On 17 March 2005, plaintiffs filed their architectural compliance permit application and, on 6 April 2005, appeared at the Town Council’s agenda meeting to present the design. After hearing the presentation, members of the Town Council expressed their disapproval of the

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design, arguing that the modern design did not fit with the Town's more traditional look. The Town Council indicated it would not approve an architectural compliance permit for the project as presented and directed plaintiffs to revise the design.

Plaintiffs modified the plans, and a new design was presented at the 8 June 2005 meeting. At that meeting, the Town Council acknowledged that plaintiffs had made design improvements. According to plaintiffs, they expected a favorable vote on the plans at the next meeting. At the 14 June 2005 meeting, one Town Council member moved for architectural approval of the plans, and another member seconded the motion. The Town Council then discussed concerns over proposed building materials and colors. Many Town residents spoke in opposition to the plans. At the end of the discussion, the Town Council voted to delay the vote until the next regular meeting.

Plaintiffs decided not to have the Town Council vote on the plans at the next meeting, but rather chose to take additional time to facilitate community discussions and attend a meeting with neighbors who were strongly opposed to the proposed plans. On 12 July 2005, the Town Council again reviewed the plans, which had been further revised. Plaintiffs again declined to have the Town Council vote on the plans, but stated they would come back to the next meeting with answers to specific questions raised by the Town Council.

On 22 and 29 July 2005, Robert Thompson, a local real estate attorney, submitted to the Town two different zoning amendment petitions supported by citizen signatures. The first petition sought to amend the UDO by reducing allowable impervious surfaces for development. The second petition sought to rezone plaintiffs' property so that it was no longer in a GB district, but rather was located in an Office Services ("OS") district. Thompson did not communicate with any Town staff or Town Council members regarding the petitions. The Town noticed the petitions for hearing in accordance with the UDO.

On 9 August 2005, at the next Town Council meeting, the Town Council received a letter from plaintiffs' attorney advising that if the Town Council did not approve the architectural plans, plaintiffs would file a lawsuit. At the meeting that evening, the Town Council postponed the scheduled vote on the plans because it said it needed time to review the letter threatening legal action sent by plaintiffs' attorney.

On 24 August 2005, the Town Planning Board heard public comments and recommended that the Town Council approve both rezon-

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ing amendments. The Planning Board concluded that the existing GB zoning for plaintiffs' property was an "anomaly" because the tract was surrounded on three sides by residential neighborhoods, with forested conservation areas across the road from the tract, and that OS zoning would serve as a buffer or transition to the adjacent neighborhoods.

On 9 September 2005, Daniel submitted plaintiffs' application and plans for an erosion control permit. Daniel and plaintiffs' counsel also each sent a letter on that date to Nuckols, requesting that the Town treat the letters and accompanying site plans as an application for a "zoning permit." Daniel made this request because he believed that plaintiffs could not satisfy the checklist requirements for applying for a zoning/building permit, so he sought to make a distinction between a "zoning" permit and the zoning/building permit recognized by the Town. In response, Nuckols sent a letter stating: "We have received the materials developed by William G. Daniel & Associates, and will proceed in our normal manner. Attached are the instructions we provide to persons seeking building/zoning permits." The letter attached the checklist Nuckols had discussed with Daniel earlier.

On 13 September 2005, the Town Council approved plaintiffs' architectural plans for the Suzuki dealership. At that meeting, the Town Council also considered the proposed zoning amendments. The Council deferred voting on the proposed amendments until the next meeting on 11 October 2005.

On 4 October 2005, the Town denied plaintiffs' erosion control application. On 11 October 2005, at approximately 4:30 p.m., Daniel went to the Town's Public Works Department and attempted to submit an application for a water and sewer permit, a driveway permit, an encroachment agreement and various plans, including an erosion control plan identical to the one that had previously been denied. The plans were accepted, but the other documents were rejected pending review of the plans.

On the evening of 11 October 2005, the Town Council voted unanimously to rezone the property so that it was located in an OS district. The Public Works Department took no further action on the submitted plans because the rezoning prohibited the proposed use. The Suzuki LOI subsequently expired, and plaintiffs are unable to operate a Suzuki dealership on the property.

On 9 December 2005, plaintiffs brought suit against defendants in the United States District Court for the Middle District of North

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Carolina. Plaintiffs asserted claims for (1) common law vested rights, (2) violation of federal substantive due process rights, (3) violation of state substantive due process rights, (4) tortious interference with contract, and (5) tortious interference with prospective economic advantage. The parties filed cross-motions for summary judgment. The district court entered an order abstaining from deciding the state law claims and staying the federal claims pending resolution of the land use and zoning issues in state court. Defendants appealed to the Fourth Circuit Court of Appeals, and on 3 July 2008, the Court affirmed. *MLC Automotive, LLC v. Town of Southern Pines*, 532 F.3d 269 (4th Cir. 2008).

On 18 October 2007, plaintiffs filed this action in Moore County Superior Court. Both parties again filed motions for summary judgment. On 12 November 2008, the trial court granted plaintiffs' motion for partial summary judgment on their claim for a common law vested right and granted defendants' motion for partial summary judgment on plaintiffs' claims for tortious interference with contract and prospective economic advantage. Both sides timely appealed to this Court.

Defendants' Appeal

[1] Defendants appeal the trial court's grant of summary judgment to plaintiffs on their claim that they had a vested right to develop the property as an auto park notwithstanding the rezoning of the property. "The standard of review for summary judgment is de novo." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007). "[O]ur standard of review is (1) whether there is a genuine issue of material fact and (2) whether the movant is entitled to judgment as a matter of law." *McCoy v. Coker*, 174 N.C. App. 311, 313, 620 S.E.2d 691, 693 (2005) (quoting *NationsBank v. Parker*, 140 N.C. App. 106, 109, 535 S.E.2d 597, 599 (2000)). We view the evidence in the light most favorable to the non-movant. *Id.*

"As a general proposition '[t]he adoption of a zoning ordinance does not confer upon citizens . . . any vested rights to have the ordinance remain forever in force, inviolate and unchanged.'" *Browning-Ferris Indus. of South Atlantic, Inc. v. Guilford County Bd. of Adjustment*, 126 N.C. App. 168, 171, 484 S.E.2d 411, 414 (1997) (quoting *McKinney v. City of High Point*, 239 N.C. 232, 237, 79 S.E.2d 730, 734 (1954)). "North Carolina does, however, recognize two methods for a landowner to establish a vested right in a zoning ordinance: (1) qualify with relevant statutes . . . ; or (2) qualify under the common law[.]" *Id.*

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In this case, plaintiffs have claimed only a vested right arising under the common law. “A party claiming a common law vested right in a nonconforming use of land must show: (1) substantial expenditures; (2) in good faith reliance; (3) on valid governmental approval; (4) resulting in the party’s detriment.” *Kirkpatrick v. Village Council for the Village of Pinehurst*, 138 N.C. App. 79, 87, 530 S.E.2d 338, 343 (2000). The disputes on appeal are whether plaintiffs acted in reliance on the required “valid governmental approval” and whether plaintiffs made substantial expenditures in reliance on that approval.

Plaintiffs first contend that existing zoning is sufficient governmental approval to give rise to a vested right when a landowner makes substantial expenditures based on that existing zoning. Under their view, because the property was zoned GB and an automobile dealership was a permitted use, they acquired a common law vested right to develop their automobile dealership when they expended sums in reliance on that zoning.

Plaintiffs, in support of their motion for summary judgment, submitted an affidavit from Linda J. Leith, the Manager of MLC and Vice President of Leith. She stated multiple times in that affidavit that Leith acquired the property “[i]n good faith reliance upon the fact that the Property was zoned GB and that automobile dealerships were a permitted use of the Property, as confirmed repeatedly by the Town” She represented that “Leith would never have purchased the Property, nor incurred any of the other expenses described in this Affidavit, if the Property had not been zoned GB where automobile dealerships were a permitted use.”

Our Supreme Court has, however, expressly rejected this contention: “[O]ne does not acquire a vested right to build, contrary to the provisions of a subsequently enacted zoning ordinance, by the mere purchase of land in good faith with the intent of so building thereon” *Town of Hillsborough v. Smith*, 276 N.C. 48, 55, 170 S.E.2d 904, 909 (1969). In other words, the fact that plaintiffs purchased the property in good faith reliance on the GB zoning is not sufficient to give rise to a vested right.

Instead, *Town of Hillsborough* set forth the following test for the existence of a common law vested right:

We, therefore, hold that *one who, in good faith and in reliance upon a permit lawfully issued to him, makes expenditures or incurs contractual obligations, substantial in amount, incidental to*

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or as part of the acquisition of the building site or the construction or equipment of the proposed building for the proposed use authorized by the permit, may not be deprived of his right to continue such construction and use by the revocation of such permit, whether the revocation be by the enactment of an otherwise valid zoning ordinance or by other means, and this is true irrespective of the fact that such expenditures and actions by the holder of the permit do not result in any visible change in the condition of the land.

Id. (emphasis added).

Plaintiffs, however, counter that the Supreme Court's subsequent decision in *In re Campsites Unlimited Inc.*, 287 N.C. 493, 501, 215 S.E.2d 73, 78 (1975), altered that rule. In *Campsites*, the landowner, Campsites, purchased and began constructing a campsite development at a time when the county had no zoning ordinance at all applicable to rural areas. *Id.* at 495, 215 S.E.2d at 74. Subsequently, the county adopted a zoning ordinance that placed the area including Campsites' property in a zone that prohibited campsite developments. *Id.* at 496, 215 S.E.2d at 75. The Court applied *Town of Hillsborough* even though Campsites had not relied upon a building permit because:

The only significance of the building permit in those cases was that such permit was required, under the ordinance in effect at the time of its issuance, in order to make the proposed use of the property lawful. In the present instance, there was no county ordinance or other law in effect at the time Campsites began its development of its property which required Campsites to obtain a permit therefor. It was then lawful for Campsites to proceed as it did.

Id. at 501, 215 S.E.2d at 77-78. The Court concluded that "[s]ubstantial expenditures and obligations were made and incurred" and that if done so in good faith, "the adoption of the county zoning ordinance . . . did not deprive Campsites of its preexisting right to so develop and use its land." *Id.* at 502, 215 S.E.2d at 78.

Defendants contend that *Campsites* only applies when a landowner makes expenditures in reliance on a complete lack of zoning, while plaintiffs contend that *Campsites* stands for the proposition that "reliance upon existing zoning is sufficient to create vested rights." In other words, plaintiffs ask us to conclude that *Campsites* overruled *sub silentio* the language in *Town of Hillsborough* holding that the purchase of property in reliance on existing zoning is insufficient to give rise to a vested right.

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We first note that Justice Lake authored both *Town of Hillsborough* and *Campsites*, and nothing in *Campsites*, which discusses the prior decision extensively, suggests any intent to limit the precedential effect of the *Town of Hillsborough* decision. Moreover, in *Finch v. City of Durham*, 325 N.C. 352, 366, 384 S.E.2d 8, 16 (1989), the Supreme Court described the holding in *Campsites* as follows: “We have held that when a property owner makes expenditures in the absence of zoning or under the authority of a building permit, subsequent changes in the zoning of the property may not prohibit the resulting nonconforming use.”

Here, there was no absence of zoning, and, therefore, *Campsites* does not apply. Plaintiffs, however, also argue that their position is supported by this Court’s decisions in *Russell v. Guilford County Bd. of Comm’rs*, 100 N.C. App. 541, 397 S.E.2d 335 (1990), and *Sunderhaus v. Bd. of Adjustment of Town of Biltmore Forest*, 94 N.C. App. 324, 380 S.E.2d 132 (1989).

In *Russell*, this Court wrote:

The obtaining of a building permit is not the crucial factual issue to be resolved when determining whether a party has acquired a vested right to continue development of land as a nonconforming use after rezoning. [*Campsites*, 287 N.C. at 501, 215 S.E.2d at 78]. To acquire a vested right under North Carolina law, “it is sufficient that, prior to . . . enactment of the zoning ordinance and with requisite good faith, he make a substantial beginning of construction and incur therein substantial expense.” *Hillsborough*, 276 N.C. at 54, 170 S.E.2d at 909. *At issue in this case is whether plaintiff made “substantial expenditures” in reasonable reliance on the current zoning of the property before the County Commission rezoned three acres of his property.*

100 N.C. App. at 543, 397 S.E.2d at 336 (emphasis added). *Russell* does not, however, discuss or even cite the test set out in *Finch*, a decision recently cited favorably by the Supreme Court as setting out the law on vested rights. See *Robins v. Town of Hillsborough*, 361 N.C. 193, 197, 639 S.E.2d 421, 423 (2007). A panel of this Court cannot, of course, adopt an interpretation of a Supreme Court decision that is contrary to the Supreme Court’s interpretation of its own precedent.

Moreover, the language in *Russell* is *dicta*. The Court ultimately held that “the trial court’s findings of fact support its conclusion that the plaintiff had not incurred substantial expenditures for the commercial development of this property.” *Russell*, 100 N.C. App. at 545, 397 S.E.2d at 337. The Court then added: “Since we find that the plain-

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tiff did not make substantial expenditures, we need not address whether plaintiff's reliance on the [county Planning Staff's] conditional approval of the plan was reasonable." *Id.* Thus, the Court itself recognized that resolution of the reliance issue was not necessary given its holding regarding substantial expenditures.¹

"Language in an opinion not necessary to the decision is *obiter dictum* and later decisions are not bound thereby." *Trustees of Rowan Technical Coll. v. J. Hyatt Hammond Assoc.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985). Our Supreme Court has stressed: "[I]t is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit where the very point is presented for decision.'" *State v. Jackson*, 353 N.C. 495, 500, 546 S.E.2d 570, 573 (2001) (quoting *Moose v. Bd. of Comm'rs of Alexander County*, 172 N.C. 419, 433, 90 S.E. 441, 448-49 (1916)).

The pertinent language in *Sunderhaus*, decided before *Finch*, is likewise *dicta*. The landowners in *Sunderhaus* had already begun to install a satellite dish when the town adopted an ordinance requiring that landowners obtain a permit before starting installation. This Court first noted that "[i]n *Campsites*, our Supreme Court held that a party may acquire a right to build without a permit if the good faith expenditures are made at a time when no permit is required." *Sunderhaus*, 94 N.C. App. at 326, 380 S.E.2d at 134. Since the landowners made their satellite dish expenditures at a time when the ordinance did not require a permit, the case fell squarely within the *Campsites* rule. Nevertheless, the Court went on to say, without citing any authority: "Likewise, a substantial expenditure or the commencement of building at a time when one zoning ordinance is in effect will serve to make the provisions of that ordinance applicable to the builder, notwithstanding the enactment of new regulations prior to the completion of the project." *Id.* This latter statement was not necessary for the decision and, therefore, is non-binding *dicta*.

Therefore, we hold that the controlling law remains, as set out in *Town of Hillsborough*, that a property owner does not acquire a vested right to develop land contrary to the provisions of a subsequently

1. We note that this portion of the *Russell* opinion is inconsistent with the suggestion that expenditures in reliance on current zoning is sufficient to give rise to a vested interest. If that was in fact the Court's intended holding, then there would be no need to leave open the question of reliance on other governmental approval, such as a conditional approval by the planning department staff.

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enacted zoning ordinance simply based on the purchase of the land in reliance on existing zoning. *Town of Hillsborough*, 276 N.C. at 55, 170 S.E.2d at 909. A vested right can arise, however, if “a property owner makes expenditures in the absence of zoning,” *Finch*, 325 N.C. at 366, 384 S.E.2d at 16, or without governmental approval when, at the time of the expenditures, no prior approval was required. *Sunderhaus*, 94 N.C. App. at 326, 380 S.E.2d at 133-34. This holding is consistent with the well-established principle that “no property owner has a *per se* vested right in a particular land-use regulation such that the regulation could remain ‘forever in force, inviolate and unchanged.’” *Michael Weinman Assocs. Gen. P’ship v. Town of Huntersville*, 147 N.C. App. 231, 233, 555 S.E.2d 342, 345 (2001) (quoting *McKinney*, 239 N.C. at 237, 79 S.E.2d at 734).

Turning to the form of government approval required by the common law vested right analysis, this Court held in *Browning-Ferris*, 126 N.C. App. at 172, 484 S.E.2d at 414, that “[i]n those situations where multiple permits are required preliminary to the issuance of the building permit, and substantial obligations and/or expenditures are incurred in good faith reliance on the issuance of those permits, the party does acquire a vested right in those provision(s) of the ordinance or regulation pursuant to which the preliminary permit(s) was issued.” Thus, *Browning-Ferris* establishes that permits other than a building permit may, when combined with substantial expenditures in reliance on the permit, give rise to a common law vested right.

Here, the Town’s UDO, which was adopted in 1989, provided that “the use made of property may not be substantially changed . . . , substantial clearing, grading or excavation may not be commenced and buildings or other substantial structures may not be constructed, erected, moved or substantially altered except in accordance with and pursuant to one of the following permits” The listed permits included a zoning permit, a grading permit, a special use permit, a conditional use permit, an erosion control permit, and, if applicable, an architectural compliance permit.

Plaintiffs do not dispute (1) that they were required under the UDO to obtain a zoning permit, a grading permit, an erosion permit, and an architectural compliance permit; and (2) that they did not obtain any of those permits prior to making their expenditures. Since plaintiffs’ expenditures were not in reliance on any permits and permits were required to proceed with the automobile dealership project, *Town of Hillsborough* and *Browning-Ferris* establish that no common law

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vested right to complete the automobile dealership arose. *See also PNE AOA Media, L.L.C. v. Jackson County*, 146 N.C. App. 470, 480, 554 S.E.2d 657, 663 (2001) (holding that no vested right arose because “[w]hile it is true that no county permit was required, a permit from DOT was, and it is clear that PNE had not secured that permit before it began to erect the sign along State Highway 441”).

Plaintiffs argue, however, that governmental approval other than a permit can give rise to a vested interest and point to two letters sent by the Town’s Planning Department. On 28 June 2001, three months after Leith contracted to purchase the property, the Code Enforcement Officer sent “Mr. Jim Murray” a letter stating only: “This letter is to advise that a car dealership can be located in the General Business District as long as it can meet all zoning requirements, such as the setbacks, landscaping, parking, etc. Should you need further information, please advise.” The letter did not reference any specific property.

On 30 November, 2001, the Code Enforcement Officer sent Mr. Danny Howell” a letter referencing the property at issue in this case. She wrote: “The above reference[d] property is located in the General Business Zoning District and is in the Highway Corridor District. Automobile Sales are a permitted use in the General Business District. However, all zoning requirements must be met per the Southern Pines Unified Development Ordinance. If you should have further questions, please advise.” Although Leith closed on the property in January 2002, plaintiffs did not begin work on the site until December 2004, more than three years after the sending of these letters.

We need not specifically address what types of government approval, short of a permit, are sufficient for the common law vested right analysis because *Browning-Ferris* establishes that expenditures in reliance on letters such as these are not sufficient to give rise to a vested right. In *Browning-Ferris*, the plaintiff intended to construct and operate a transfer station. On 13 June 1994, the Director of the county Planning Department sent a letter to the plaintiff informing the plaintiff that the land on which it intended to build the transfer station was zoned Heavy Industrial (“HI”) and that a transfer station was a permitted use in the HI zone. He explained further that the plaintiff would still have to meet watershed, driveway, parking, landscaping, and other requirements set out in the county zoning ordinance. 126 N.C. App. at 169, 484 S.E.2d at 413. In reliance on this letter, the plaintiff purchased the property. *Id.* Three months later, the technical review committee for the county conditionally approved the site development plan subject to

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12 conditions. *Id.* Subsequently, the county board of commissioners adopted an amendment to the zoning ordinance providing that construction and operation of a transfer station would require a special use permit. *Id.*

The plaintiff argued that it had a common law vested right to proceed with the transfer station without a special use permit, as the ordinance had allowed prior to the amendment. This Court concluded that the plaintiff did not have a vested right to proceed with the transfer station consistent with the pre-amended ordinance, explaining: “In so holding we reject the arguments of [the plaintiff] that substantial expenditures in reliance on the pre-amended Ordinance, *the 13 June 1994 letter from [the planning director]* or the conditional approval of the site development plan gives rise to a vested right to construct and operate a transfer station.” *Id.* at 172, 484 S.E.2d at 415 (emphasis added).

We see no meaningful basis for distinguishing *Browning-Ferris* from this case. The letter from the *Browning-Ferris* planning director is virtually identical with the 30 November 2001 letter from the Code Enforcement Officer in this case—it merely confirmed that a particular use was a permitted use in the applicable zone, but also stressed that the project would have to meet other requirements set out in the zoning ordinance.² We are bound by this Court’s holding in *Browning-Ferris* that substantial expenditures in reliance on the prior version of the ordinance and a letter of this nature are not sufficient to give rise to a vested right.

Plaintiffs argue that *Browning-Ferris* does not apply because the zoning classification in that case never changed, while it did change in this case. That argument mistakes the nature of a common law vested right. The question presented by the vested right analysis is whether an amendment to an ordinance applies to development of the property that was started prior to the date of the amendment. Plaintiffs have cited no authority suggesting that the vested rights analysis varies if the amendment involves a change in the zoning classification rather than an increase in the requirements necessary for completion of a project. To the contrary, in *Sunderhaus*, 94 N.C. App. at 327, 380 S.E.2d at 134, one of the cases upon which plaintiffs rely, this Court applied the same vested rights analysis used in cases involving zoning classification

2. The 28 June 2001 letter in this case did not even specifically address this property. It did nothing more than reiterate the pertinent portion of the zoning ordinance.

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changes to an appeal in which the zoning amendment did not change the permissible uses, but rather only added a permit requirement.

Plaintiffs further argue that *Huntington Props., LLC v. Currituck County*, 153 N.C. App. 218, 569 S.E.2d 695 (2002), should control the decision in this case rather than *Browning-Ferris*. To the extent that plaintiffs contend that *Huntington* should be more persuasive because it is a more recent decision, plaintiffs have mistaken the law. Since one panel of this Court may not overrule a second panel, when two decisions are inconsistent, we are required to follow the earlier decision. See *In re R.T.W.*, 359 N.C. 539, 542 n.3, 614 S.E.2d 489, 491 n.3 (2005) (in considering two lines of cases that developed in Court of Appeals—*Stratton* line and *Hopkins* line—Court held, under *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36-37 (1989), that “[t]he *Hopkins* panel should have followed *Stratton*, which is the older of the two cases”). Accordingly, if *Huntington* is inconsistent with *Browning-Ferris*, we are required to follow *Browning-Ferris*.

We do not believe that we need to reach that question, however, since *Huntington*, even in the absence of *Browning-Ferris*, would not require a different result. In *Huntington*, Orchard Park, a mobile home park, was constructed in 1972 and initially approved to accommodate 440 mobile homes. 153 N.C. App. at 220, 569 S.E.2d at 698. During the 1970s and 1980s, Orchard Park operated at near capacity, but in 1987, the State limited the park to 140 mobile homes because of new restrictions on private wastewater systems. *Id.* In 1992, the county amended its UDO to prohibit mobile home parks altogether except for lawful nonconforming uses such as Orchard Park. *Id.* The plaintiff purchased Orchard Park in 1995 and subsequently sought to upgrade the wastewater treatment system and operate the mobile home park at the original capacity of 440 mobile homes. *Id.* at 220-21, 569 S.E.2d at 698-99. In 1996, however, the county amended its UDO again to provide that improvements to water and sewage treatment systems to accommodate more mobile homes in a mobile home park would be considered an impermissible enlargement of a nonconforming use. *Id.* at 221-22, 569 S.E.2d at 669. The plaintiff sued seeking an injunction prohibiting the county from enforcing the amendment against it.

This Court, after first concluding that, even before the amendment, the county’s UDO prohibited more than 140 mobile homes, then addressed the plaintiff’s argument that it had a common law vested right to operate 440 mobile homes. In the language relied upon by

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plaintiffs in this case, the Court stated: “Plaintiffs could have established vested rights in Orchard Park by (1) obtaining zoning and building permits from the State which would have allowed them the right to expand Orchard Park, or (2) obtaining a final interpretation of the UDO from the County’s Planning Staff stating that they were allowed to operate Orchard Park at a capacity over 140 units.” *Id.* at 226, 569 S.E.2d at 701. The description of the second prong was, however, *dicta*. As this Court noted, “it would have been impossible for plaintiffs to have obtained permission to expand Orchard Park because a 440-unit mobile home park was not otherwise lawful at the time Orchard Park became nonconforming in 1992, much less when the Amendment was passed in 1996.” *Id.* at 227, 569 S.E.2d at 702. Thus, the language set out in the second prong of the *Huntington* test was not necessary to the decision.

In any event, we are not persuaded that the two letters in this case would, even under the *Huntington* test, be sufficient to give rise to a vested right.³ *Huntington* required “a final interpretation of the UDO from the County’s Planning Staff stating that they were *allowed to operate Orchard Park at a capacity over 140 units.*” *Id.* at 226, 569 S.E.2d at 701 (emphasis added). Consistent with prior vested rights precedent, we read this language as requiring approval of the specific project and not just a reiteration of the UDO. *See Robins*, 361 N.C. at 197, 639 S.E.2d at 423 (observing that “our vested rights decisions have considered whether a plaintiff has a right to *complete his project* despite changes in the applicable zoning ordinances” (emphasis added)).

Here, the June 2001 letter did not address the specific parcel of land at all and, therefore, could not be a final interpretation approving the project sought to be developed by plaintiffs. With respect to the November 2001 letter, we do not view this letter as an “interpretation” of the UDO. The letter merely stated what was apparent on the face of the UDO and the zoning maps: that a particular piece of property was zoned as GB and that automobile sales were a permissible

3. While plaintiffs describe the generic letters in this case as “certificates of zoning compliance,” they cite no authority of any type defining what constitutes a “certificate of zoning compliance” or whether a generic letter of the type here—not addressing a specific project—is a “certificate of zoning compliance.” We further note that plaintiffs rely on treatises and not case law to support the proposition that a certificate of zoning compliance is valid governmental approval for purposes of a vested right. We express no opinion on whether a certificate of zoning compliance is sufficient because *Browning-Ferris* establishes that, in any event, a letter of the type relied upon in this case is not adequate government approval.

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use in the GB district. If the Planning Staff had simply photocopied the pertinent schedule of the UDO and the zoning map, precisely the same information would have been conveyed. Nothing was interpreted. In addition, the letter—which was sent three years before Leith approached the Town about its actual intended auto park—did not address a specific project. The letter did not state that *plaintiffs'* proposed auto park could in fact be built on that parcel of land. Indeed, the letter stressed that, for any motor vehicle sales project, all zoning requirements would still have to be met.⁴

Plaintiffs argue that these letters are no different than the quarry permit found to be sufficient governmental approval to raise the issue of a common law vested right in *Simpson v. City of Charlotte*, 115 N.C. App. 51, 57-58, 443 S.E.2d 772, 776-77 (1994). In *Simpson*, however, the property owner applied for and received a permit allowing it to construct and operate a specific quarry on a parcel of land adjoining an existing quarry. In other words, because a permit was issued, there was a final approval by a zoning administrator of the construction and operation of a particular, described project. The same is not true of the letters in this case.⁵

If we were to accept plaintiffs' argument that a vested right could be based on letters, sent three years before a project materialized and confirming only that a use was expressly permitted within a particular zoning classification, we would in effect be allowing a property owner to obtain a vested right solely by making expenditures in reliance on existing zoning. Since, as we have explained, *Town of Hillsborough* does not permit such a result, we hold that plaintiffs' expenditures in reliance on the June and November 2001 letters did not result in a common law vested right.

Plaintiffs have, therefore, failed to demonstrate that their expenditures were in reliance upon government approval of their project, a

4. This Court in *Browning-Ferris* cited *Avco Com. Developers v. South Coast Reg. Comm'n*, 17 Cal. 3d 785, 132 Cal. Rptr. 386, 390-91, 553 P.2d 546, 551 (1976), *appeal dismissed and cert. denied*, 429 U.S. 1083, 51 L. Ed. 2d 529, 97 S. Ct. 1089 (1977), for the proposition that "preliminary governmental approval [is] not sufficient to support [a] vested right[.]" *Browning-Ferris*, 126 N.C. App. at 171-72, 484 S.E.2d at 414. In *Avco*, the court held that government approval issued prior to any submission of the details of the project was not sufficient for purposes of vested right analysis. 17 Cal. 3d at 794, 132 Cal. Rptr. at 391-92, 553 P.2d at 551-52.

5. Plaintiffs also cite *City of Winston-Salem v. Hoots Concrete Co.*, 37 N.C. App. 186, 245 S.E.2d 536, *disc. review denied*, 295 N.C. 645, 248 S.E.2d 249 (1978), but that case involved no discussion of vested rights.

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critical element of their claim of a common law vested right. Accordingly, the trial court erred in granting summary judgment to plaintiffs and denying summary judgment to defendants on this claim.

Plaintiffs' Appeal

[2] Plaintiffs, in their appeal, contend that the trial court erred in granting summary judgment to defendants on plaintiffs' claims for tortious interference with contract and tortious interference with prospective economic advantage based on their loss of a Suzuki dealership.⁶ To establish tortious interference with contract, a plaintiff must show: (1) a valid contract between the plaintiff and a third person, (2) the defendant knew about that contract, (3) the defendant intentionally induced the third person not to perform the contract, (4) the defendant acted without justification, and (5) the plaintiff suffered actual damages. *Bloch v. Paul Revere Life Ins. Co.*, 143 N.C. App. 228, 239, 547 S.E.2d 51, 59, *disc. review denied*, 354 N.C. 67, 553 S.E.2d 35 (2001). To establish tortious interference with prospective economic advantage, a plaintiff must show that the defendant, without justification, induced a third party to refrain from entering into a contract with the plaintiff, which would have been made absent the defendant's interference. *Dalton v. Camp*, 138 N.C. App. 201, 211, 531 S.E.2d 258, 265 (2000), *rev'd on other grounds*, 353 N.C. 647, 548 S.E.2d 704 (2001).

Because, based on our review of the record, we believe that plaintiffs failed to present sufficient evidence that defendants acted without legal justification in rezoning the property, we address only that element of the tort claims. A person "acts without justification in inducing the breach of contract . . . if he has no sufficient lawful reason for his conduct." *Childress v. Abeles*, 240 N.C. 667, 675, 84 S.E.2d 176, 182 (1954). A plaintiff must show that the defendant was acting not "in the legitimate exercise of [his] own right, 'but with a design to injure the plaintiff or gain some advantage at his expense.'" *Dalton*, 138 N.C. App. at 211, 531 S.E.2d at 265 (quoting *Owens v. Pepsi Cola Bottling Co. of Hickory, N.C., Inc.*, 330 N.C. 666, 680, 412 S.E.2d 636, 644 (1992)).

6. The parties agree that the Town Council members, in their individual capacities, are entitled to legislative immunity as to these claims. The parties dispute, however, whether the doctrines of legislative and sovereign immunity protect the Town, the Town Council, and the Town Council members in their official capacities. As we conclude that summary judgment was properly granted to defendants on the merits, we do not address the immunity issues.

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In arguing that defendants acted without justification, plaintiffs first point to the Fourth Circuit's decision upholding the district court's order abstaining from ruling on plaintiffs' state law claims, including the tortious interference claims, and staying decision on the federal constitutional claims pending decision of the land use and zoning issues in state court. *MLC*, 532 F.3d at 284. Pointing to the court's discussion whether summary judgment was warranted on the federal claims notwithstanding state law, plaintiffs argue that the Fourth Circuit effectively concluded that issues of fact exist regarding whether defendants acted with justification in rezoning the property. *See id.* at 281-82 (addressing Town's argument "that summary judgment was appropriate regardless of the resolution of Leith's vested rights claim"). Since the district court declined to rule on the state law issues, and the Fourth Circuit concluded that the district court properly did so, we cannot conclude that we are in any way bound by the Fourth Circuit's determination that issues of fact exist on the federal constitutional claims.

Plaintiffs also argue that this case is analogous to *Browning-Ferris Indus. of South Atlantic, Inc. v. Wake County*, 905 F. Supp. 312 (E.D.N.C. 1995). In *Browning-Ferris*, the individual plaintiff, Jonathan Garrity, had contracted to lease property he owned near Lake Crabtree to the second plaintiff, Browning-Ferris ("BFI"), for use as a solid waste facility. The Town of Morrisville approved the plaintiffs' site plan and that approval was upheld by the state courts despite challenges by nearby property owners. *Id.* at 315. Wake County also issued a land disturbing permit. *Id.* After the Town of Cary approved BFI's connecting to the Cary sanitary sewer system, the Town of Morrisville then issued a building permit for the facility. *Id.* The plaintiffs then obtained an easement from an adjacent property owner allowing a sewer line to run across his land to connect with the sewer line owned by Wake County that in turn connected with the Cary wastewater treatment plant. *Id.*

Subsequently, the Wake County Board of Commissioners discussed the suitability of locating a solid waste facility near Lake Crabtree. *Id.* Ultimately, the Board voted to adopt a resolution urging the State not to issue a pollutant discharge elimination system permit. *Id.* at 316. The Board also voted to adopt a resolution informing the Town of Cary that the county took the position that a prior agreement between Cary and the county gave the county the right to approve sewage flowing through its sewer line to Cary's treatment plant. *Id.* The Board then voted to deny BFI access to its sewer line and adopted a resolution notifying the Town of Cary of its denial. *Id.* BFI then terminated its contractual relationship with Garrity. *Id.*

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Both BFI and Garrity brought suit against the county asserting violations of the state and federal constitutions. Garrity also asserted a cause of action for tortious interference with a contractual relation. On the latter claim, the court ultimately held that summary judgment should be denied due to the existence of genuine issues of material fact regarding the issue of legal justification. *Id.* at 324.

Prior to addressing this cause of action, however, the court had already concluded that plaintiffs had acquired both statutory vested rights (by virtue of the issuance of the building permit) and common law vested rights (based on the plaintiffs' making substantial expenditures in reliance on the site plan approval and the issuance of the building permit). *Id.* at 318-19. In addition, the court concluded that the county did not act with a legitimate objective because its actions were outside the county's jurisdiction. *Id.* at 320.

The court found that the location of the facility—which was the basis for the county's and the public's objections—"was not a matter rightfully within the Board's purview and that its concerns about the facility's storm water runoff was an issue best left to the responsible state regulatory agency. The County had no authority to regulate land use within the geographical confines of the Town of Morrisville." *Id.* at 320. The court added that "[i]n addition to having no jurisdiction over the tract of land" on which the facility was being built, the county's concern regarding the storm water runoff was a "matter . . . which falls under the jurisdiction of the [Department of Environment, Health and Natural Resources]," even if it "might have been a legitimate concern." *Id.* Further, the court concluded that the county's motives in acting were improper because the county's concern—the storm water runoff into Lake Crabtree—was unrelated to the action it took: barring the passage of effluent through its sewer line. *Id.* at 321.

The court ultimately held:

A thorough review of the evidence of record leads the court to the inescapable conclusion that defendant denied BFI access to the [sewer line] for the sole reason that defendant did not want plaintiffs to proceed with their plans to construct the [facility] on the Garrity tract. The reason for the denial of access had nothing to do with the effluent from the BFI facility that was to be sent through the [sewer line]. The County had already issued the one permit over which it had issuing authority, the land disturbing permit.

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Id. In sum, the county in *Browning-Ferris* blocked a project in which the plaintiffs had a vested right for reasons outside the county's jurisdiction.

None of the factors pertinent in *Browning-Ferris* exist in this case. First, we have already concluded that plaintiffs did not have a vested right in their auto park project. In addition, defendants' actions fell squarely within the Town's jurisdiction to regulate land use within the Town. N.C. Gen. Stat. § 160A-382(a) (2009) ("For any or all these purposes, the city may divide its territorial jurisdiction into districts of any number, shape, and area that may be deemed best suited to carry out the purposes of this Part; and within those districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures, or land.").

Although plaintiffs argue that the evidence is undisputed that defendants' purpose was to "unlawfully stop Leith," plaintiffs do not address the motive behind the desire to prevent the auto park. Defendants had the authority to amend the zoning ordinance. *See* N.C. Gen. Stat. § 160A-385(a)(1) (2009) ("Zoning ordinances may from time to time be amended, supplemented, changed, modified or repealed."). This authority includes amendments to the zoning map. *Id.* ("In case, however, of a qualified protest against a zoning map amendment, that amendment shall not become effective except by favorable vote of three-fourths of all the members of the city council."). Because of this authority, it is not enough to show that defendants voted to rezone in order to bar plaintiffs' project; plaintiffs must show that defendants' reason for barring that project through rezoning was not a legitimate justification.

Plaintiffs argue that, just like Wake County in *Browning-Ferris*, defendants were acting "under the guise of protecting the public's interest." Plaintiffs have overlooked the critical distinction: Wake County, in *Browning-Ferris*, was acting in an area outside of its jurisdiction regarding an interest outside its authority, while the public interest in this case falls squarely within the authority and jurisdiction of defendants.

The evidence in the record indicates that the public objections and defendants' motive in stopping the auto park was a concern that such a project was not an appropriate use for that location since it was surrounded on three sides by residential districts and, on the fourth side, had a conservation area across the highway. The General Assembly has placed responsibility for addressing such a concern on defendants. *See*

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N.C. Gen. Stat. § 160A-383 (2009) (“The [zoning] regulations shall be made with reasonable consideration, among other things, as to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such city.”). Finally, the action taken by defendants directly related to the concern—they concluded that the use was not appropriate for the location and rezoned the location to make it a district more in character with the surrounding property. Thus, the rationale behind *Browning-Ferris* supports the grant of summary judgment in this case.

In *Carolina Water Serv., Inc. of N.C. v. Town of Atlantic Beach*, 121 N.C. App. 23, 464 S.E.2d 317 (1995), *disc. review denied*, 342 N.C. 894, 467 S.E.2d 901 (1996), this Court similarly concluded that summary judgment was appropriately granted to a town on a claim of tortious interference with contract. The plaintiff contended that the town had maliciously, intentionally, and unlawfully interfered with the plaintiff’s contracts to furnish water service to various homeowners in an annexed area when the town offered the residents a discount to connect to newly-constructed town water lines. *Id.* at 27, 464 S.E.2d at 320. In concluding that the plaintiff had failed to present evidence showing that the defendants had acted without justification, the Court pointed out that the General Assembly had authorized municipalities to provide water to residents, that the setting of water rates and fees is a matter for the judgment and discretion of municipal authorities, and that a municipality has authority to extend its water lines to an annexed area when it is concerned that the residents in the annexed area are no longer receiving water service equal to that provided by the town to other areas within the municipal boundaries. *Id.* at 28-29, 464 S.E.2d at 321.

Thus, in *Carolina Water Service*, the town did not act without justification when it acted pursuant to legislatively-granted authority in order to address a public concern that the legislature had determined to be within the town’s jurisdiction. Here, defendants acted pursuant to their legislatively-granted zoning authority to remedy a public concern—that the current zoning of the property was not consistent with the character of the neighborhood—that was a concern the legislature has stressed should be considered by municipalities. Accordingly, the trial court properly granted defendants’ motion for summary judgment as to plaintiffs’ claims for tortious interference with contract and prospective economic advantage.

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We note that plaintiffs are, in effect, seeking to obtain the equivalent of a vested right without meeting the requirements for either a common law or statutory vested right. If we were to hold, as plaintiffs urge, that defendants were not legally justified in changing the zoning for plaintiffs' property after they knew about plaintiffs' plans for an auto park, that precedent would mean that even if a municipality lawfully rezoned property—prior to any right vesting—it could still be held liable for substantial damages. We do not believe that a municipality acts without justification if it exercises its zoning authority, in accordance with statutory authority, to amend the zoning map in a manner that does not violate any vested rights. *See Varner v. Bryan*, 113 N.C. App. 697, 702, 440 S.E.2d 295, 298 (1994) (holding that person acts with legal justification if he “does a wrongful act or exceeds his legal right or authority in order to prevent the continuation of the contract between the parties”).

Conclusion

In sum, we reverse the trial court's order granting summary judgment to plaintiffs on their claim of a common law vested right and remand for entry of summary judgment in defendants' favor. We affirm the trial court's entry of summary judgment in defendants' favor on the claims for tortious interference with contract and tortious interference with prospective economic advantage.

Affirmed in part; reversed and remanded in part.

Judges ROBERT C. HUNTER and CALABRIA concur.

SIGNATURE DEVELOPMENT, LLC, PLAINTIFF v. SANDLER
COMMERCIAL AT UNION, L.L.C., DEFENDANT

No. COA09-646

(Filed 2 November 2010)

**1. Appeal and Error— interlocutory order—immediately
appealable—certified under Rule 54(b)—affected a substantial
right**

The Court of Appeals considered the merits of plaintiff's appeal from an interlocutory order partially granting defendant's motion to dismiss in a breach of contract case. The trial court certified the order under Rule 54(b) of the Rules of Civil Procedure

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and the order affected a substantial right because the same factual issues were involved in the claims which were dismissed and the claims which remained and if the appeal was not immediately heard, different juries could reach different results thereby rendering inconsistent verdicts on the same factual issues.

2. Construction Claims— breach of contract—general contractor—control test—erroneous dismissal

The trial court erred in partially granting defendant's motion to dismiss in a breach of contract case based on the trial court's finding that plaintiff was an unlicensed general contractor. Plaintiff did not exercise the requisite control over a development project to be considered a general contractor and thus was not required to be licensed under N.C.G.S. § 87-1.

3. Construction Claims— breach of contract—general contractor—control test—action not dismissed

Defendant's arguments that the trial court's order partially dismissing plaintiff's complaint in fact dismissed plaintiff's entire complaint or, in the alternative, that the trial court erred by failing to dismiss plaintiff's complaint in its entirety were not addressed because the Court of Appeals concluded that the trial court erred in partially dismissing plaintiff's complaint.

4. Liens— materialman's lien—not attached for lost profits

The trial court did not err in striking plaintiff's claim of lien against the property at issue because a materialman's lien does not attach for lost profits.

5. Attachment— erroneous dissolution—not related to claim of lien—action pending

The trial court erred in dissolving an order of attachment obtained by plaintiff pursuant to N.C.G.S. § 1-440.3 because the order was not related to a stricken claim of lien and plaintiff's breach of contract action was pending.

6. Attachment— application for dissolution—remanded

Appellee Wells Fargo's application to dissolve an order of attachment obtained by plaintiff was remanded to the trial court because the trial court did not rule on the application.

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Appeal by Plaintiff from order entered 28 January 2009 by Judge Christopher M. Collier in Union County Superior Court. Heard in the Court of Appeals 18 November 2009.

Rayburn Cooper & Durham, P.A., by James B. Gatehouse, David S. Melin, and Daniel J. Finegan, for Plaintiff-Appellant.

Johnston, Allison & Hord, P.A., by Gary J. Welch and Daniel A. Merlin, for Defendant-Appellee.

Troutman Sanders, LLP, by Gavin B. Parsons and D. Kyle Deak, for Applicant-Appellee Wells Fargo Bank, National Association.

Horack Talley Pharr & Lowndes, P.A., by John W. Bowers, for The National Association of Industrial and Office Properties, NC Chapter, Amicus Curiae.

STEPHENS, Judge.

The paramount issue is whether the trial court erred in partially granting Defendant's motion to dismiss based on the general contractor licensing law. For the reasons stated herein, we reverse the order of the trial court.

I. Procedural History and Factual Allegations

On 28 January 2005, Plaintiff Signature Development, LLC ("Plaintiff," "Signature," or "Project Manager") and Defendant Sandler Commercial at Union, L.L.C. ("Defendant," "Sandler," or "Owner") entered into a Development Management Agreement ("Agreement") concerning the development of Sandler's sixteen acres of property in Union County, North Carolina ("Property") into a retail complex ("Project"). The Project, to be known as Cureton Town Center, was to be completed in three phases, with the initial phase consisting of the development of a grocery store parcel and four out-parcels ("Initial Phase").

Under the Agreement, Sandler, designated as "Owner," engaged Signature as "Project Manager" for the Initial Phase. As Project Manager, Signature "either directly or through subcontractors, employees or agents approved in writing by Owner, shall act as Owner's agent in the management, construction management, development, marketing and leasing coordination of the Project." The Agreement further provides that as Project Manager, Signature shall perform all project management services "subject to the general direction, control and approval of Owner[.]" In exchange for

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Signature's project management services, the Agreement provides that Sandler pay Signature certain fees, including an Initial Development Fee, a Base Development Fee, a Leasing Fee, a Sales Fee, and a Participation Fee.

According to Signature, it has satisfied its obligations under the Agreement and the Project is now over 95% leased, with Harris Teeter as its anchor tenant and ground leases to Sun Trust and First Charter. Sandler has paid Signature the Base Development Fee, Leasing Fees, and Sales Fees.¹ However, Sandler has failed to pay Signature the Participation Fee, which Signature estimates to be not less than \$2,338,806.

On 8 August 2008, pursuant to Chapter 44A of the North Carolina General Statutes, Signature filed in Union County Superior Court a claim of lien on the Property to secure the \$2,338,806 debt allegedly owed to Signature by Sandler. On 12 August 2008, Signature filed a complaint against Sandler seeking, *inter alia*: damages for breach of contract, breach of covenant of good faith and fair dealing, unjust enrichment, fraud, negligent misrepresentation, and unfair and deceptive trade practices; an order for prejudgment attachment pursuant to N.C. Gen. Stat. § 1-440.1, *et seq.*; an accounting and the imposition of a constructive trust; and perfection of its 8 August 2008 claim of lien.

On 28 August 2008, Signature procured an order of attachment in the amount of \$2,338,806 against the Property. Also on that date, Signature filed a notice of *lis pendens* with regard to the Property.

On 3 September 2008, Signature caused to be issued summonses of garnishee and notices of levy upon individuals and entities believed to be in possession of Sandler's property, primarily retail tenants in the Cureton Town Center, and banks, including Applicant-Appellee Wells Fargo Bank, National Association ("Wells Fargo").²

On 25 September 2008, Wells Fargo filed an Application to Dissolve and/or Modify Order of Attachment ("Application") seeking, *inter alia*, dissolution or modification of the 28 August 2008 order of attachment. Wells Fargo alleged that it had first and second priority

1. The Initial Development Fee of \$47,725 was to be paid to Signature "[c]ontemporaneously with the execution of [the] Agreement[.]" Signature does not allege in its complaint that this fee has not been paid.

2. Beginning in December 2005, Wells Fargo took a series of deeds of trust from Sandler which were secured by the Property. By virtue of those deeds of trust, Wells Fargo has over 12 million dollars invested in the Property.

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lien rights to the rent payments from the tenants of Cureton Town Center and that Signature was interfering with Wells Fargo's rights in those monies by means of the order of attachment and garnishment summons.

On 7 October 2008, Sandler filed a motion to dismiss pursuant to Rule 12(b)(6). Sandler alleged that Signature's complaint, with the attached Agreement, revealed that Signature was a "general contractor" under N.C. Gen. Stat. § 87-1, that the trial court "may take judicial notice that Signature is not a licensed general contractor," and that under North Carolina law, unlicensed general contractors are barred from recovering monies from a property owner "on any claim[.]" Thus, Sandler moved the trial court to dismiss all Signature's claims, dissolve the order of attachment and release the garnishees, cancel the claim of lien, and order any funds paid into the court by virtue of the order of attachment to be given to Sandler immediately.

Wells Fargo's Application and Sandler's Motion to Dismiss were heard on 27 October 2008. By order entered 28 January 2009, the trial court partially granted Sandler's motion to dismiss, struck Signature's claim of lien, and dissolved the order of attachment. The trial court further ordered Signature to provide an accounting of all amounts received by virtue of the order of attachment and to forward such receipts to Wells Fargo.

From the trial court's order, Signature appeals.³

II. Discussion

A. Grounds for Appellate Review

[1] As a threshold issue, we must determine whether the trial court's order in this case is immediately appealable. An order which does not dispose of all claims as to all parties in an action is interlocutory. *Cunningham v. Brown*, 51 N.C. App. 264, 267, 276 S.E.2d 718, 722 (1981). Ordinarily, there is no right of appeal from an interlocutory order. *CBP Resources, Inc. v. Mountaire Farms, Inc.*, 134 N.C. App. 169, 170, 517 S.E.2d 151, 153 (1999). However, an interlocutory order may be immediately appealed "(1) if the order is final as to some but not all of the claims or parties and the trial court certifies there is no just reason to delay the appeal pursuant to N.C. R. Civ. P. 54(b) or (2) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review." *Id.* at 171, 517 S.E.2d at 153 (citations and quotation marks omitted).

3. On 25 February 2009, the trial court entered an order staying execution of the 28 January 2009 order pending this appeal.

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When an appeal is from an order that is final as to one party, but not all, and the trial court has certified the matter under Rule 54(b), this Court must review the issue. *James River Equip., Inc. v. Tharpe's Excavating, Inc.*, 179 N.C. App. 336, 340, 634 S.E.2d 548, 552, *disc. review denied and appeal dismissed*, 361 N.C. 167, 639 S.E.2d 650 (2006). However, when an appeal is from an order which is not final as to any party (*e.g.*, one which disposes of some but not all claims against a party), “the trial court’s determination that there is ‘no just reason for delay’ of appeal, while accorded deference, cannot bind the appellate courts[.]” *Anderson v. Atlantic Cas. Ins. Co.*, 134 N.C. App. 724, 726, 518 S.E.2d 786, 788 (1999) (internal citation omitted).

In this case, the trial court certified that the order partially granting Sandler’s motion to dismiss was a “final judgment as to one or more of Plaintiff’s claims, and that there is no just reason for delay, and that it therefore constitutes a final judgment pursuant to Rule 54(b).” However, because the order on appeal disposes of some but not all claims against Sandler, the trial court’s Rule 54(b) certification is not binding on this Court, and we must determine whether a substantial right would be affected absent immediate appeal of the interlocutory order.

The “substantial right” test for appealability of interlocutory orders is that “the right itself must be substantial and the deprivation of that substantial right must potentially work injury to [appellant] if not corrected before appeal from final judgment.” *Goldston v. American Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990). Generally, we must determine if a substantial right is affected “by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered.” *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978).

In this case, the trial court found that “as an unlicensed contractor Plaintiff Signature cannot sue for monies owed under provisions 3(a) and (b) of the Development Management Agreement, that it appears that the compensation for these construction/development obligations is described in paragraph 4(a) and (b) of the Agreement, and that Defendant’s Motion to Dismiss those claims should be allowed.” The trial court further found that “accordingly, the lien placed on the [P]roperty by Plaintiff should be stricken and the related attachment order dissolved” The same factual issues are involved in the claims based on provisions 3(a), 3(b), 4(a), and 4(b) of the Agreement

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which were dismissed and in Signature's claims based on the remaining provisions of the Agreement. If the present appeal is not immediately heard, it is possible that different juries could reach different results thereby rendering inconsistent verdicts on the same factual issues. As the right to avoid the possibility of two trials on the same issues is a substantial right, *Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982), the partial grant of Sandler's motion to dismiss affects a substantial right which would be prejudiced if this action was not immediately appealable. Accordingly, we will reach the merits of this appeal.

B. Motion to Dismiss

[2] Signature argues that the trial court erred in partially granting Sandler's motion to dismiss based on the trial court's finding that Signature was an unlicensed general contractor. We agree.

1. Standard of Review

A motion to dismiss under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief may be granted tests the legal sufficiency of the complaint. *Isenhour v. Hutto*, 350 N.C. 601, 604, 517 S.E.2d 121, 124 (1999). In ruling on the motion, "the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979). Dismissal is proper "(1) when the complaint on its face reveals that no law supports plaintiff's claim; (2) when the complaint reveals on its face that some fact essential to plaintiff's claim is missing; and (3) when some fact disclosed in the complaint defeats the plaintiff's claim." *Schloss Outdoor Advertising Co. v. Charlotte*, 50 N.C. App. 150, 152, 272 S.E.2d 920, 922 (1980). Moreover, "[w]hen the complaint states a valid claim but also discloses an unconditional affirmative defense which defeats the asserted claim, . . . the motion will be granted and the action dismissed." *Skinner v. E. F. Hutton & Co.*, 314 N.C. 267, 270, 333 S.E.2d 236, 238 (1985). "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff could prove no set of facts in support of his claim which would entitle him to relief." *Leonard v. Pugh*, 86 N.C. App. 207, 209, 356 S.E.2d 812, 814 (1987). On appeal of a trial court's ruling on a 12(b)(6) motion to dismiss, our Court "conducts a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Page v. Lexington*

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Ins. Co., 177 N.C. App. 246, 248, 628 S.E.2d 427, 428 (2006) (citation and quotation marks omitted).

*2. Propriety of the Trial Court's
Order as to Signature*

A “general contractor” is defined by N.C. Gen. Stat. § 87-1 as

any person or firm or corporation who for a fixed price, commission, fee, or wage, . . . undertakes to superintend or manage, on his own behalf or for any person, firm, or corporation that is not licensed as a general contractor pursuant to this Article, the construction of any building, highway, public utilities, grading or any improvement or structure where the cost of the undertaking is thirty thousand dollars (\$30,000) or more[.]

N.C. Gen. Stat. § 87-1 (2009). One who undertakes a project as a general contractor in North Carolina is required to comply with the licensing requirements set forth in N.C. Gen. Stat. § 87-10. That statute requires

an examination, either oral or written, of all applicants for license to ascertain, for the classification of license for which the applicant has applied: (i) the ability of the applicant to make a practical application of the applicant’s knowledge of the profession of contracting; (ii) the qualifications of the applicant in reading plans and specifications, knowledge of relevant matters contained in the North Carolina State Building Code, knowledge of estimating costs, construction, ethics, and other similar matters pertaining to the contracting business; (iii) the knowledge of the applicant as to the responsibilities of a contractor to the public and of the requirements of the laws of the State of North Carolina relating to contractors, construction, and liens[.]

N.C. Gen. Stat. § 87-10(b) (2009). The express language of N.C. Gen. Stat. § 87-10 indicates that it is designed to ensure competence within the construction industry. *Brady v. Fulghum*, 309 N.C. 580, 584, 308 S.E.2d 327, 330 (1983). “By requiring this examination, the legislature seeks to guarantee skill, training and ability to accomplish such construction in a safe and workmanlike fashion.” *Id.* (citation and quotation marks omitted).

A general contractor’s failure to procure a license constitutes a misdemeanor. N.C. Gen. Stat. § 87-13 (2009). Furthermore, although the statute does not expressly preclude an unlicensed contractor’s

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suit against an owner for breach of contract, the North Carolina Supreme Court held in *Bryan Builders Supply v. Midyette*, 274 N.C. 264, 162 S.E.2d 507 (1968), that the contractor may not recover on the contract or in *quantum meruit* when he has ignored the protective statute. “[T]he reason for this ‘bright line’ ‘harsh’ rule is to protect the public from incompetent builders” *Dellinger v. Michal*, 92 N.C. App. 744, 747, 375 S.E.2d 698, 699, *disc. review denied*, 324 N.C. 432, 379 S.E.2d 240 (1989).

In determining whether a party is a general contractor, we must “determine the extent of [the party’s] control over the entire project.” *Mill-Power Supply Co. v. CVM Assocs.*, 85 N.C. App. 455, 461, 355 S.E.2d 245, 249 (1987). As this Court noted in *Helms v. Dawkins*, 32 N.C. App. 453, 232 S.E.2d 710 (1977), *overruled on other grounds*, *Sample Const. Co. v. Morgan*, 311 N.C. 717, 722-23, 319 S.E.2d 607, 611 (1984),

[n]ot every person who undertakes to do construction work on a building is a general contractor, even though the cost of his undertaking exceeds \$30,000.00. . . . [T]he principal characteristic distinguishing a general contractor from a subcontractor or other party contracting with the owner with respect to a portion of the project, or a mere employee, is the degree of control to be exercised by the contractor over the construction of the entire project.

Id. at 456, 232 S.E.2d at 712 (internal citations omitted). “Under the *Helms* ‘control test,’ we ordinarily look to the terms of the contract to determine the degree of control exercised by a particular contractor over the entire project.” *Mill-Power Supply Co.*, 85 N.C. App. at 461, 355 S.E.2d at 249. “[A] general contractor is one with control over a construction project.” *Duke Univ. v. Am. Arbitration Ass’n*, 64 N.C. App. 75, 80, 306 S.E.2d 584, 587, *disc. review denied*, 309 N.C. 819, 310 S.E.2d 349 (1983).

In *Miley v. H.C. Barrett & Assocs.*, No. COA01-720, 2002 N.C. App. LEXIS 2167 (May 21, 2002), this Court considered the terms of a contract between plaintiff (“HCB”) and defendant (“Owners”) to determine if HCB had acted as a general contractor. Although, as an unpublished case, *Miley* does not establish binding legal precedent, we are persuaded by this Court’s reasoning in that case. *See State v. Farmer*, 158 N.C. App. 699, 705, 582 S.E.2d 352, 356 (2003) (“[A]lthough not controlling law, we are persuaded by an earlier unpublished opinion of this Court in which we addressed a similar set of circumstances”). The pertinent provisions of the contract in *Miley* stated:

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1. HCB agrees to supervise and co-ordinate the construction of a dwelling house for the Owners at the address referred to in this agreement pursuant to the plans and specifications attached to this agreement with the understanding that the Owners may make any and all changes to the plans and specifications as the Owners deem appropriate from time to time.

* * * *

4. The relationship between Owners and HCB shall be that of Owners and subcontractor.

5. It is anticipated that HCB will negotiate in its own name contracts for labor and materials for the construction of the dwelling house. However, it is strictly understood that HCB is acting as agent for the Owners and that all contracts for labor, materials and supplies are entered into for and on behalf of the Owners, and it is further understood that where practical Owners may be involved in contract negotiations and that where possible, Owners will co-sign contracts along with HCB.

6. It is agreed that Owners will be responsible for all costs of construction of the dwelling, including but not limited to all costs of materials, labor, Builders Risk Insurance thru [sic] HCB's policy, Workman's Compensation Insurance as required, all losses by theft, fire or other causes and all errors or omissions during the construction of the dwelling. In the event of errors or omissions, HCB will exercise its best efforts to correct the situation through the Owner[s'] subcontractor or vendor causing said error or omission.

* * * *

8. All invoices or work, labor and materials due to all contractors shall be paid by Owners when due. HCB will inspect and provide approved invoices to Owners after receipt by HCB. By the 1st day of each month following the date any invoice is due, Owners will provide to HCB in writing their certification by specific reference thereto that all due invoices have been paid. . . .

* * * *

e) In no event shall HCB be responsible for or obligated to pay for any errors or omissions in the construction of the dwelling house and in no event shall the Owners be entitled to setoff for such errors or omissions against the fees due to HCB pursuant to the agreement.

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Id. at *10-12. After considering the contractual provisions, this Court concluded that “HCB served as a construction manager under a pure construction management arrangement; HCB was neither a general contractor nor a builder of plaintiffs’ home.” *Id.* at *13. This conclusion was “reinforced by the fact that HCB acted solely as plaintiffs’ agent, had no control over the manner in which the construction project was actually performed, and assumed no responsibility for costs, timeliness, or quality of the project.” *Id.*

In this case, the pertinent aspects of the Agreement between Sandler and Signature are as follows:

WHEREAS, Owner desires to engage the Project Manager to provide general management, development, construction management, marketing, and leasing coordination services in connection with the Initial Phase (hereinafter in this Agreement the Initial Phase shall be referred to as the “Project”), and the Project Manager desires to provide such services on the terms and conditions set forth in this Agreement.

....

1. Engagement of the Project Manager. Owner hereby engages the Project Manager as an independent contractor to provide the services described in this Agreement relating to management, development, construction, marketing and leasing coordination with respect to the Project

....

3. Services to be Performed. Owner shall provide, in a timely manner, adequate funding to cover all approved costs and expenses incurred by Project Manager in the performance of its duties hereunder. The Project Manager, either directly or through subcontractors, employees or agents approved in writing by Owner, shall act as Owner’s agent in the management, construction management, development, marketing and leasing coordination of the Project. In carrying out its responsibilities pursuant to this Agreement, Project Manager shall have authority to enter into contracts on behalf of Owner . . . of . . . \$50,000[] or less, provided that no individual contractor or vendor shall receive more than one (1) contract with a cumulative total in excess of . . . \$50,000[] without Owner’s prior consent; provided, however, at Project Manager’s request, Owner shall timely execute any such contracts that Owner approves. Owner must approve (and will timely execute) all other contracts

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to be awarded for the Project The Project Manager shall, subject to the general direction, control and approval of Owner, and subject to timely payment of all applicable costs and expenses by Owner as herein described, perform the following services:

a. Planning Function. The Project Manager shall provide planning and processing services to secure all governmental and other required approval for implementation of the Project. Such services shall include, but not be limited to, the following:

i. Obtain plans and specifications . . . for the development and construction of the Project which are satisfactory to and are approved by Owner.

ii. Procurement of all . . . required licenses, permits, bonds and/or approvals required for development and construction of the Project

iii. Coordination of geotechnical, engineering and architectural services to be performed by professional consultants to secure the necessary permits and approvals

b. Development and Construction Function. The Project Manager shall provide services for the coordination and project management of all land development and construction items related to the Project including, but not limited to, the following (provided Owner shall approve prior to engagement each architect's, engineer's and contractor's financial responsibility).

i. Pursue development and construction of the Project in accordance with the Plans and Specifications.

ii. Competitively bid and/or negotiate contracts and recommend to Owner for Owner's approval award of contracts to financially responsible architects, engineers, general contractors and others for the completion of infrastructure and construction of the Project. All contracts shall be in the name of Owner, and once approved by Owner, may be executed by the Project Manager on behalf of Owner. All contracts shall require that the architect, engineer or contractor has adequate and proper insurance with companies and in amounts satisfactory to Owner, providing insurance coverage for both Project Manager and Owner.

iii. Using approved architects, engineers and contractors, oversee and enforce completion of infrastructure within the Project and approval of infrastructure by local, county and state agencies.

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iv. Using approved engineers, architects and contractors, oversee, direct and coordinate the work of construction of the Project and installation of all utilities required for the Project.

v. Procure all lien waivers and releases of liens from any and all architects, engineers, contractors, subcontractors and material suppliers who perform labor and/or provide materials to the Project.

vi. Oversee the prompt completion of repairs required for final local, county and state inspections of the Project and obtain certificates of occupancy for the Project.

vii. Secure approval of such bonds and permits, as may be required

. . . .

xii. Instruct and monitor all agents, employees, contractors and invitees who enter the Project as to all safety requirements, and report any unsafe conditions or actions immediately to Owner.

xiii. Take commercially reasonable steps to protect the Project, including all construction, from and against loss or damage from any cause and be responsible for all parts of the construction, temporary and permanent, whether finished or not, including all materials delivered to the Project, until final completion, as determined by Owner. . . .

c. Leasing and Marketing Function. The Project Manager shall act as the Master Leasing Agent for the Project and shall coordinate leasing and marketing of the Project, including, but not limited to, the following:

i. Project Manager shall at the request of Owner devise and implement a leasing and marketing program for the Project.

ii. Project Manager shall oversee all leasing and land sales to obtain leases or sales agreements with tenants or owners occupying 10,001 square feet or more of retail space within the Project other than within any outparcel (“Anchor Tenants”) and tenants or owners occupying an outparcel at the Project (“Outparcel Tenants”). All leases and sales contracts for and with Anchor Tenants and Outparcel Tenants shall be subject to Owner’s approval and shall be executed by Owner.

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iii. Project Manager shall negotiate an agreement with First Colony Corporation (“First Colony”) or another leasing agent approved by Owner to lease space at the Project . . . and to manage the Project once certificates of occupancy have been issued permitting the first tenant to occupy the Project. The leasing agreement with First Colony and the management agreement with First Colony shall be subject to Owner’s approval, shall be executed by Owner and shall provide that Owner can terminate each agreement upon thirty (30) days prior notice

d. Property Management Function. Until such time as a management agreement has been entered into with First Colony or another management company, the Project Manager shall provide general property management services, including but not limited to, the following:

i. Periodic inspection of the Property

ii. With use of outside counsel reasonably acceptable to Owner, establish Covenants, Conditions and Restrictions and cross-easement agreements necessary for the operation of the Project.

. . . .

4. Compensation. For and in consideration of Project Manager’s services under this Agreement, Owner agrees to pay Project Manager the following amounts:

a. Contemporaneously with the execution of this Agreement, the amount of . . . \$47,725.00[] (the “Initial Development Fee”).

b. A fee (the “Base Development Fee”) equal to . . . 2 1/2%[] of the costs incurred by Owner to develop and construct the Project subsequent to the date of execution of this Agreement, excluding from such costs the Initial Development Fee, the Base Development Fee, interest carry, financing costs and land contribution value (the “Base Project Cost”)

c. Owner shall pay Project Manager a leasing fee (the “Leasing Fee”) for [procuring leases to Anchor Tenants and Outparcel Tenants].

d. If an Outparcel Tenant purchases its site rather than leases its site, the Project Manager shall receive a sales fee (the “Sales Fee”)

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e. A fee equal to twenty percent (20%) of the net profits (the “Net Profits”) realized and distributed by Owner from the sale, financing, refinancing and/or operation of the Project (the “Participation Fee”).

The Agreement unambiguously vested control over the entire Project with Sandler. The Agreement further unambiguously provided that Signature’s performance of its project management services was “subject to the general direction, control and approval of Owner” and that, similar to HCB, Signature was to “act as Owner’s agent in the management, construction management, development, marketing and leasing coordination of the Project.” By the terms of the Agreement, Sandler retained control of all costs associated with the Project, including expenses incurred by Signature. While Signature was given authority to enter into contracts for \$50,000 or less, subject to certain conditions, Signature did so “on behalf of Owner” and all other contracts had to be approved and executed by Sandler. Sandler also retained control over the approval of “architects, engineers, general contractors, and others” hired for the Project. Additionally, all contracts associated with the project were to be in Sandler’s name, and Sandler was to approve all plans and specifications. By the terms of the Agreement, Signature, like HCB, assumed no responsibility for costs, timeliness, or quality of the project. After considering the contractual provisions in the Agreement at issue here, we conclude that Signature was not a general contractor but, rather, served as Sandler’s agent under a pure project management arrangement.

Sandler argues further, however, that the terms of the Agreement “clearly show[] that Signature [] controlled the project[.]” In support of this contention, Sandler highlights certain terms of the Agreement which outline Signature’s planning, development, and construction management duties. However, Sandler fails to acknowledge that, by the express terms of the Agreement, Signature was only to “act as Owner’s agent in the management, construction management, development, marketing and leasing coordination of the Project” and that Signature’s performance of its project management duties was “subject to the general direction, control and approval of Owner[.]”

Sandler also argues that Signature’s “responsibilities encompass the very definition of a construction manager, who when controlling a construction project, *must* be properly licensed[.]” and relies on *Duke Univ. v. Am. Arbitration Ass’n* for its “holding that the construction manager controlled the project and therefore was the ‘general manager’ of the project and needed to be licensed[.]” Sandler’s argument misses the mark.

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Initially, we note that while N.C. Gen. Stat. § 87-1 requires that a “general contractor” be licensed, it does not govern license requirements of a “project manager” or a “general manager.” Indeed, neither party has argued that a “project manager” or a “general manager” must be licensed according to statute. Moreover, Sandler misstates the holding in *Duke*. In *Duke*, this Court held that defendant, a contractor who contracted directly with the owner to fabricate and erect the stucco wall panel system of Duke Hospital North and to perform related lath and plastering work, was not a general contractor under N.C. Gen. Stat. § 87-1. This Court based its conclusion on the fact that defendant “did not undertake to build the hospital in its entirety, nor did it undertake to improve an already existing building.” *Duke*, 64 N.C. App. at 78, 306 S.E.2d at 586. Furthermore, “[d]efendant had control solely over construction of the stucco wall panel system and related lath and plastering work; it had no control over the work of other contractors nor over the construction project as a whole.” *Id.* at 79, 306 S.E.2d at 586. Although this Court noted that “[d]efendant’s work was subject to the approval of the construction manager” who had been hired by the owner to supervise the construction project, and that “[t]he supervision of the construction manager over each separate trade contractor was ample protection for [the owner] against the possible incompetency of any of its trade contractors[,]” *id.* at 80, 306 S.E.2d at 587, contrary to Sandler’s contention, whether the manager who was hired to supervise the project had a general contractor’s license was not at issue in the case.

Sandler additionally cites the following language from Title 21, chapter 12, section .0208(a) of the North Carolina Administrative Code in support of its contention that Signature is a general contractor:

The term “undertakes to superintend or manage” as used in [N.C. Gen. Stat. §] 87-1 to describe a person, firm or corporation deemed to be a general contractor means that the person, firm, or corporation is responsible for superintending or managing the entire construction project, and . . . is compensated for superintending or managing the project based upon the cost of the project or the time taken to complete the project. Such person, firm, or corporation must hold a general contracting license in the classifications and limitation applicable to the construction of the project.

21 N.C. Admin. Code 12.0208(a) (2009). Sandler contends that Signature’s complaint and the terms of the Agreement indicate that Signature was “responsible for superintending or managing the entire construction project.” We disagree.

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Consistent with prior case law and our analysis in this case, whether a “person, firm, or corporation is responsible for superintending or managing the entire construction project” is determined under “the *Helms* ‘control test[.]’ ” *Mill-Power Supply Co.*, 85 N.C. App. at 461, 355 S.E.2d at 249. As explained *supra*, the terms of the Agreement do not indicate that Signature held the requisite control over the Project to be classified as a general contractor and, instead, indicate that Signature served solely as Sandler’s agent under a pure project management arrangement.

Moreover, our interpretation of N.C. Gen. Stat. § 87-1 and section .0208(a) under the “control test” is fully supported by a recent amendment to section .0208(a) which states:

(b) The term “undertakes to superintend or manage” described in Paragraph (a) of this Rule does not include the following:

. . . .

(2) subject to the conditions stated within this Subparagraph and Paragraph (c), any person, firm, or corporation retained by an owner of real property as a consultant, agent, or advisor to perform development-related functions, including:

- (A) assisting with site planning and design,
- (B) formulating a development scheme,
- (C) obtaining zoning and other entitlements,
- (D) tenant selection and negotiation,
- (E) interfacing and negotiating with the general contractor, engineer, architect, other construction and design professionals and other development consultants with whom the land owner separately contracts, including, negotiating contracts on the owner’s behalf, assisting with scheduling issues, ensuring that any disputes between such parties are resolved to the owner’s satisfaction, and otherwise ensuring that such parties are proceeding in an efficient, coordinated manner to complete the project,
- (F) providing cost estimates and budgeting,
- (G) monitoring the progress of development activities performed by other parties,
- (H) arranging and negotiating governmental incentives and entitlements, and

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(I) selecting and sequencing sites for development.

(c) The exclusions set forth in Subparagraph (b)(2) do not apply, however, unless the following conditions are satisfied:

(1) the owner has retained a licensed general contractor or licensed general contractors to construct the entire project or to directly superintend and manage all construction work in which the person, firm or corporation has any involvement and which would otherwise require the use of a licensed general contractor, and

(2) the use of the person, firm or corporation will not impair the general contractor's ability to communicate directly with the owner and to verify the owner's informed consent and ratification of the directions and decisions made by the person, firm or corporation to the extent that such directions or decisions affect the construction activities otherwise requiring the use of a licensed general contractor.

21 N.C. Admin. Code 12.0208 (Cumm. Supp. Aug. 2010).

This amendment became effective after the complaint in this case was filed and, thus, does not impact the outcome of this case. Nonetheless, the clear intent behind the amendment is to formalize the "control test" and to clearly exclude from the general contractor licensing requirements a party who, like Signature, contracts with the owner to perform the "development-related functions" enumerated in the amendment on a project where, as here, the owner retained a licensed general contractor to perform the general contractor role.⁴

Taking the allegations of the complaint in the light most favorable to Signature, it appears to this Court that Sandler engaged Signature not to perform the work of a general contractor in the construction of the Project, but to act as Sandler's agent in the day-to-day management of the Project; that Signature satisfactorily completed its duties under the Agreement; and that Sandler has failed to pay Signature the Participation Fee as required by the Agreement. As this Court has noted, "[t]he licensing statutes should not be used as a shield to avoid a just obligation owed to an innocent party." *Zickgraf Enters., Inc. v. Yonce*, 63 N.C. App. 166, 168, 303 S.E.2d 852, 852 (1983).

4. We note that the project management services Signature contracted with Sandler to provide under the Agreement are strikingly similar to the "development-related functions" described in the amendment.

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Sandler nonetheless claims that “Signature [] is not ‘innocent’ by the plainest meaning of the word [because] Signature [] had the ability and opportunity to obtain a license with the North Carolina Licensing Board of General Contractors, but chose not to.” Sandler further opines that “[a]lthough the consequences are harsh, they are consequences which Signature [] brought on itself by not simply obtaining a general contractor’s license.” We strongly disagree with Sandler’s position.

As thoroughly explained, *supra*, Signature was not a general contractor on the Project and, thus, was not required to obtain a general contractor’s license. Moreover, based on the record before this Court, it appears that Sandler’s failure to pay Signature the Participation Fee was not the result of Signature’s choice not to obtain a general contractor’s license, or any incompetent work performed by Signature, but, instead, was a direct result of Sandler’s having inadequate financial resources to meet its obligations under the Agreement, a condition which Signature certainly did not bring upon itself. Additionally, while Sandler was well within its rights as the owner to retain full control over the Project, Sandler may not now attempt to claim it is entitled to be “protected” from Signature by N.C. Gen. Stat. § 87-1, especially when the general contractor actually hired by Sandler was ample protection for Sandler against the possible incompetency of any of its contractors.

We thus conclude that under the circumstances of this case, it was inappropriate for the trial court to dismiss Signature’s claims on Sandler’s Rule 12(b)(6) motion. We reverse the trial court’s order on this issue.

[3] Sandler argues that the trial court’s order, in fact, dismissed Signature’s complaint “in its entirety” because payment of the Participation Fee was based on Signature’s services provided pursuant to provisions 3(a) and (b) of the Agreement. However, because we conclude that the trial court erred in dismissing Signature’s claims under those provisions, we need not address Sandler’s argument. By way of cross-appeal, Sandler alternatively argues that the trial court erred by failing to dismiss Signature’s lawsuit “in its entirety” because Signature was an unlicensed general contractor. However, because we conclude that the trial court erred in finding and concluding that Signature was an unlicensed general contractor, and in partially dismissing Signature’s claims on this basis, it necessarily follows that the trial court did not err by failing to dismiss Signature’s lawsuit “in its entirety” on the basis that Signature was an unlicensed general contractor. Accordingly, we reject Sandler’s argument.

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C. Claim of Lien

[4] Signature next argues that the trial court erred in striking its claim of lien against the Property. We disagree.

Pursuant to N.C. Gen. Stat. § 44A-8,

[a]ny person who performs or furnishes labor or professional design or surveying services or furnishes materials or furnishes rental equipment pursuant to a contract, either express or implied, with the owner of real property for the making of an improvement thereon shall . . . have a right to file a claim of lien on the real property to secure payment of all debts owing for labor done or professional design or surveying services or material furnished or equipment rented pursuant to the contract.

N.C. Gen. Stat. § 44A-8 (2009). The primary purpose of the lien statute is “to protect laborers and materialmen who expend their labor and materials upon the buildings of others.” *Carolina Bldrs. Corp. v. Howard-Veasey Homes, Inc.*, 72 N.C. App. 224, 233-34, 324 S.E.2d 626, 632 (citation and quotation marks omitted), *disc. rev. denied*, 313 N.C. 597, 330 S.E.2d 606 (1985). “[A] lien under [N.C. Gen. Stat. §] 44A-8 attaches only for ‘debts owing for labor done or professional design or surveying services or material furnished.’ Nothing is said about lost profit.” *W.H. Dail Plumbing, Inc. v. Roger Baker & Assocs., Inc.*, 78 N.C. App. 664, 667, 338 S.E.2d 135, 137 (quoting N.C. Gen. Stat. § 44A-8), *disc. review denied*, 316 N.C. 71, 345 S.E.2d 398 (1986).

In this case, Signature filed a claim of lien against the Property “in support of its rights to be paid for the work that it did to improve the . . . [P]roperty.” The basis of Signature’s claim of lien was Sandler’s nonpayment of the Participation Fee under provision 4(e) of the Agreement. The Participation Fee provides for payment to Signature of 20% of the “net *profits* . . . realized and distributed by [Sandler] from the sale, financing, refinancing and/or operation of the Project[.]” (Emphasis added). As a materialman’s lien under N.C. Gen. Stat. § 44A-8 attaches to property only for debts owing for labor done or professional design or surveying services or material furnished, and not for lost profits, *id.*, there was no debt owing under provision 4(e) which would support the claim of lien. Accordingly, the trial court did not err in striking Signature’s claim of lien against the Property.

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D. Attachment

[5] Finally, Signature argues that the trial court erred in dissolving the order of attachment. We agree.

Pursuant to N.C. Gen. Stat. § 1-440.1,

[a]ttachment is a proceeding ancillary to a pending principal action, is in the nature of a preliminary execution against property, and is intended to bring property of a defendant within the legal custody of the court in order that it may subsequently be applied to the satisfaction of any judgment for money which may be rendered against the defendant in the principal action.

N.C. Gen. Stat. § 1-440.1(a) (2009). “Attachment may be had in any action the purpose of which, in whole or in part, or in the alternative, is to secure a judgment for money” N.C. Gen. Stat. § 1-440.2 (2009). In actions in which attachment may be had under N.C. Gen. Stat. § 1-440.2, an order of attachment may be issued when the defendant is

(1) A nonresident, or

(2) A foreign corporation, or

. . . .

(5) A person or domestic corporation which, with intent to defraud his or its creditors,

a. Has removed, or is about to remove, property from this State, or

b. Has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete [sic], property.

N.C. Gen. Stat. § 1-440.3 (2009).

In addition to the grounds for attachment specified in N.C. Gen. Stat. § 1-440.2,

in all cases where the owner removes or attempts or threatens to remove an improvement from real property subject to a claim of lien on real property under [Chapter 44A, Article2], without the written permission of the lien claimant or with the intent to deprive the lien claimant of his or her claim of lien on real property, the remedy of attachment of the property subject to the claim of lien on real property shall be available to the lien claimant or any other person.

N.C. Gen. Stat. § 44A-15 (2009).

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In this case, Signature is seeking a monetary judgment for Sandler's alleged fraud, unjust enrichment, unfair and deceptive trade practices, and breach of contract in connection with Sandler's failure to pay Signature the Participation Fee in accordance with the Agreement. Signature applied for an order of attachment on the Property by filing an Affidavit in Attachment Proceeding. In accordance with N.C. Gen. Stat. § 1-440.3, the affidavit stated as grounds for attachment that Sandler is: (1) "[a] nonresident[;]" (2) "[a] foreign corporation[;]" and (3) "[a] person or domestic corporation which, with intent to defraud his/her or its creditors . . . has removed or is about to remove, property from this state . . . [and] has assigned, disposed of, secreted, or is about to assign, dispose of, or secrete [sic], property."

The trial court found and concluded that

Plaintiff Signature cannot sue for monies owed under provisions 3(a) and (b) of the Development Management Agreement, that it appears that the compensation for these construction/development obligations is described in paragraph 4(a) and (b) of the Agreement, and that Defendant's Motion to Dismiss those claims should be allowed. . . .

. . . [A]ccordingly, the lien placed on the [P]roperty by Plaintiff should be stricken and the *related* attachment order dissolved[.]

(Emphasis added).

As discussed *supra*, the trial court erred in dismissing Signature's claims for breach of contract, breach of covenant of good faith and fair dealing, unjust enrichment, fraud, negligent misrepresentation, and unfair and deceptive trade practices based on Sandler's failure to pay the Participation Fee. However, the trial court did not err in striking Signature's claim of lien. Nonetheless, while the trial court's striking of Signature's claim of lien entered pursuant to N.C. Gen. Stat. § 44A-8 would have mandated the dismissal of a *related* order of attachment entered pursuant to N.C. Gen. Stat. § 44A-15, Signature's order of attachment in this case was procured under N.C. Gen. Stat. § 1-440.3 and, thus, was not *related* to the stricken claim of lien.

It is undisputed that Sandler is a limited liability company organized and existing under the laws of the State of Virginia. Accordingly, Sandler is a "[a] foreign corporation" under N.C. Gen. Stat. § 1-440.3. Furthermore, Signature's action based on Sandler's failure to pay the Participation Fee is pending. *See* N.C. Gen. Stat. § 1-440.2 ("Attachment may be had in any action the purpose of which, in whole or in part, or in

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the alternative, is to secure a judgment for money . . .”). Accordingly, the trial court erred in dissolving the Order of Attachment for the reasons it stated and the trial court’s order on this issue is reversed.

[6] Wells Fargo asserts, however, that the trial court did not err in dissolving the order of attachment because, as an alternative basis, the trial court could have dissolved the order since the rent proceeds and leases are property of Wells Fargo and were never property of Signature for the purpose of attachment or levy. For the reasons stated below, we remand this issue to the trial court.

Pursuant to N.C. Gen. Stat. § 1-440.43,

[a]ny person other than the defendant who claims property which has been attached, or any person who has acquired a lien upon or an interest in such property . . . may

(1) Apply to the court to have the attachment order dissolved or modified . . . upon the same conditions and by the same methods as are available to the defendant

N.C. Gen. Stat. § 1-440.43 (2009). The conditions and methods available to the defendant are as follows:

(b) When the defect alleged as grounds for the motion appears upon the face of the record, no issues of fact arise, and the motion is heard and determined upon the record.

(c) When the defect alleged does not appear upon the face of the record, the motion is heard and determined upon the affidavits filed by the plaintiff and the defendant, unless, prior to the actual commencement of the hearing, a jury trial is demanded in writing by the plaintiff or the defendant. Either the clerk or the judge hearing and determining the motion to dissolve the order of attachment *shall find the facts upon which his ruling thereon is based*. If a jury trial is demanded by either party, the issues involved shall be submitted and determined at the same time the principal action is tried, unless the judge, on motion of any party for good cause shown, orders an earlier trial or a separate trial.

N.C. Gen. Stat. §. 1-440.36 (2009) (emphasis added).

In this case, Wells Fargo filed its Application pursuant to N.C. Gen. Stat. §§ 1-440.43 and 1-440.36. The basis for the Application was that the rent proceeds and leases were property of Wells Fargo, and, thus, were never the property of Signature for the purpose of attach-

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ment or levy. The Application, along with Sandler's Motion to Dismiss, was heard on 27 October 2008.

In the Order Partially Granting Sandler's Motion to Dismiss entered 28 January 2009, the trial court stated:

THIS CAUSE COMING ON TO BE HEARD and being heard on October 27, 2008 upon Defendant Sandler Commercial at Union, L.L.C.'S ("Sandler") Motion to Dismiss and Wells Fargo Bank's Application to Dissolve and/or Modify the Order of Attachment; and

IT APPEARING TO THE COURT, having reviewed the materials submitted and hearing argument from counsel the Court concludes that Defendant Sandler's Motion to Dismiss should be partially allowed.

The trial court thereupon found and concluded that

as an unlicensed contractor Plaintiff Signature cannot sue for monies owed under provisions 3(a) and (b) of the Development Management Agreement, that it appears that the compensation for these construction/development obligations is described in paragraph 4(a) and (b) of the Agreement, and that Defendant's Motion to Dismiss those claims should be allowed.

The trial court further found and concluded that

pursuant to this ruling, Plaintiff cannot recover for construction/development claims, that accordingly, the lien placed on the [P]roperty by Plaintiff should be stricken and the related attachment order dissolved

We have held that the trial court erred in dissolving the attachment order on this basis. Furthermore, the trial court made no findings of fact pursuant to N.C. Gen. Stat. § 1-440.36(c) concerning the issues raised in Wells Fargo's Application.

Although Wells Fargo asserts that the order of the trial court is "unclear as to what grounds upon which it dissolved the Order of Attachment[.]" we conclude that the trial court unequivocally dissolved the Order of Attachment based on Sandler's Motion to Dismiss and did not rule on Wells Fargo's Application. Accordingly, we remand this matter to the trial court for consideration of Wells Fargo's Application.

In sum, for the foregoing reasons, we hold as follows: (1) the trial court's order dismissing Signature's claims under provisions 3(a) and (b) of the Agreement is reversed and this matter is remanded for fur-

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ther proceedings on Signature's claims; (2) the trial court's order striking Signature's claim of lien is affirmed; (3) the trial court's order dissolving Signature's order of attachment based on Sandler's motion to dismiss is reversed; (4) the matter is remanded for further proceedings on Wells Fargo's Application to dissolve/modify Signature's order of attachment.

REVERSED IN PART, AFFIRMED IN PART, and REMANDED in part.

Judges McGEE and STEELMAN concur.

DARE COUNTY, TOWN OF NAGS HEAD, TOWN OF SOUTHERN SHORES, STARCO REALTY & CONSTRUCTION, INC., JOSEPH M. GERAGHTY, WASHINGTON COUNTY, CURRITUCK COUNTY, HYDE COUNTY, THE TOWN OF DUCK, THE TOWN OF SOUTHERN SHORES, CARTERET COUNTY, THE TOWN OF PINE KNOLL SHORES, THE TOWN OF INDIAN BEACH, AND THE TOWN OF KILL DEVIL HILLS, PETITIONERS v. THE NORTH CAROLINA DEPARTMENT OF INSURANCE, COMMISSIONER OF INSURANCE WAYNE GOODWIN AND NORTH CAROLINA RATE BUREAU, RESPONDENTS

AND

DARE COUNTY, WASHINGTON COUNTY, CURRITUCK COUNTY, HYDE COUNTY, CARTERET COUNTY, NEW HANOVER COUNTY, BRUNSWICK COUNTY, CHOWAN COUNTY, PERQUIMANS COUNTY, TYRREL[L] COUNTY, PAMLICO COUNTY, PASQUOTANK COUNTY, TOWN OF NAGS HEAD, TOWN OF DUCK, TOWN OF SOUTHERN SHORES, TOWN OF INDIAN BEACH, TOWN OF PINE KNOLL SHORES, TOWN OF EMERALD ISLE, TOWN OF KILL DEVIL HILLS, TOWN OF KURE BEACH, TOWN OF CEDAR POINT, TOWN OF HERTFORD, STARCO REALTY & CONSTRUCTION, INC., [AND] JOSEPH M. GERAGHTY, PETITIONERS v. THE NORTH CAROLINA DEPARTMENT OF INSURANCE, COMMISSIONER OF INSURANCE WAYNE GOODWIN AND NORTH CAROLINA RATE BUREAU, RESPONDENTS

No. COA09-1171 and 1172

(Filed 2 November 2010)

1. Administrative—judicial review of consent order—not a final agency decision

The trial court correctly concluded that it did not have subject matter jurisdiction over petitioners' request for judicial review of a consent order concerning coastal residential insurance rates. The relevant statutory provisions of Chapter 58 of the North Carolina General Statutes and the Administrative Procedure Act are con-

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strued in pari materia, so that a request for judicial review pursuant to N.C.G.S. § 58-2-75 may only be taken from an agency decision or final agency decision. The consent order here was not an agency decision with respect to petitioners because they were not “the person making the filing” or “a person intervening in the filing.”

Appeal by Petitioners from order entered 29 April 2009 by Judge Ronald L. Stephens in Wake County Superior Court. Heard in the Court of Appeals 15 April 2010.

Williams Mullen, by M. Keith Kapp, Kevin Benedict, and Jennifer A. Morgan, for petitioner-appellants.

Young Moore and Henderson, P.A., by R. Michael Strickland, William M. Trott, Marvin M. Spivey, Jr., and Glenn C. Raynor, for respondent-appellee North Carolina Rate Bureau.

Attorney General Roy Cooper, by Daniel S. Johnson, Special Deputy Attorney General, and David W. Boone, Assistant Attorney General, for the respondent-appellees North Carolina Department of Insurance and Commissioner of Insurance.

ERVIN, Judge.

Petitioners¹ appeal from an order dismissing their petitions ultimately intended to result in judicial review of a consent order entered by the Commissioner of Insurance. After careful consideration of Petitioners’ arguments in light of the record and the applicable law, we conclude that the trial court’s order should be affirmed.

I. Factual Background

A. Substantive Facts

1. Insurance Ratemaking Procedures

The North Carolina Rate Bureau was created by N.C. Gen. Stat. § 58-36-1 (2009) for the purpose of representing companies that sell insurance, including “insurance against loss to residential real property . . . and any contents thereof[.]” N.C. Gen. Stat. § 58-36-1(1). An insurance

1. Petitioners include twelve North Carolina counties, ten North Carolina towns, and two private parties. All Petitioners joined in the petition and appeal in Case No. COA09-1171; the petition and appeal in Case No. COA09-1172 was filed by five counties, seven towns, and the two private parties. Since our holding is equally applicable to any and all Petitioners and to the parties in both cases, we shall simply refer to the persons and entities challenging the trial court’s orders as “Petitioners” regardless of whether they are parties to Case No. COA09-1172, Case No. COA09-1172, or both.

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company must be a member of the Rate Bureau before it may write insurance in North Carolina. N.C. Gen. Stat. § 58-36-5(a) (2009). The Commissioner is an elected State official, *see* N.C. Gen. Stat. § 58-2-5 (2009), whose “duties as chief officer of the Department of Insurance are broadly described as ‘the execution of laws relating to insurance.’” *State ex rel. Comm’r of Ins. v. N.C. Rate Bureau*, 160 N.C. App. 416, 418, 586 S.E.2d 470, 471 (2003), *aff’d*, 358 N.C. 539, 597 S.E.2d 128 (2004) (citing N.C. Gen. Stat. § 58-2-1 (2001)). Similarly, the Department of Insurance is an agency of the State of North Carolina that is responsible, among other things, for “execution of the laws relating to insurance.” N.C. Gen. Stat. § 58-2-1 (2009).

In seeking a change in homeowners’ insurance rates:

The [Rate] Bureau must submit proposed rate changes . . . to the Commissioner. N.C. Gen. Stat. § 58-36-15(a) (2007). . . . Once the Bureau has completed a rate filing with the required information, it is submitted to the Commissioner for consideration. The rate filing may be approved in one of two ways: (1) the Commissioner may formally approve the filing; or (2) if the Commissioner does not issue a notice of hearing within 50 days of the rate filing, the rate filing is deemed approved by operation of law. N.C. Gen. Stat. §§ 58-36-15 and 58-36-20 (2007). . . .

If . . . the Commissioner determines that the rates requested are “excessive, inadequate or unfairly discriminatory,” the Commissioner must . . . fix[] a date for hearing[.] . . . If a hearing is ordered, the Bureau and the Department both participate in the hearing as opposing parties, with the Commissioner serving as the hearing officer to adjudicate the dispute.

State ex rel. Comm’r of Ins. v. Dare County, — N.C. App. —, 692 S.E.2d 155, 156-57 (2010) (*Dare County I*). During the consideration of an application for increased homeowners’ insurance rates, the Rate Bureau and the Department may, subject to the Commissioner’s approval, reach a settlement concerning the appropriate level of homeowners’ insurance rates:

Pursuant to the North Carolina Administrative Code, “[i]nformal disposition may be made of a contested case or an issue in a contested case by stipulation, agreement, or consent order at any time during the proceedings. Parties may enter into such agreements on their own or may ask for a settlement conference with the hearing officer to promote consensual disposition of the case.”

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Id., — N.C. App. at —, 692 S.E.2d at 157 (citing 11 N.C. Admin. Code 1.0417 (2008)). The consent order at issue in this case resulted from the use of such a settlement process.

2. Consent Order

On 8 December 2008, the Rate Bureau filed a request with the Commissioner seeking “revised premium rates for homeowners’ insurance subject to the jurisdiction of the Rate Bureau.” In its filing, the Rate Bureau requested a statewide average increase in homeowners’ insurance rates of 19.5%, with the proposed increases in coastal territories ranging from 32.1% to 69.8%. The Rate Bureau’s filing was assigned Docket No. 1434 by the Department. On 11 December 2008, the Rate Bureau submitted a second filing seeking approval for certain alterations in the territories used to establish homeowners’ insurance rates. On 18 December 2008, the Commissioner, the Department, and the Rate Bureau executed a “Consolidated Settlement Agreement and Consent Order,” in which the parties agreed to and the Commissioner approved changes in existing homeowners’ insurance rates and territories.² According to the consent order:

The Rate Bureau and the Department have agreed to settle the 2008 Rate Filing and the 2008 Territory Filing. The proposed settlement would approve the revised territorial definitions and would provide for an overall statewide rate increase of 3.9%, with changes varying by form and territory[.] . . .

It appearing to the Commissioner that the Rate Bureau and the Department have, after consultation . . . and subject to approval by the Commissioner . . . entered into a settlement of all matters and things in dispute in connection with the 2008 Rate Filing and the 2008 Territory Filing; . . . and it appearing to the Commissioner that settlement under the circumstances set forth above is fair and reasonable and should be approved:

NOW, THEREFORE, IT IS ORDERED AND AGREED as follows:

2. The information in the record suggests that the Rate Bureau and the Department, with the knowledge of the Commissioner, had been in negotiations for some time prior to the 8 and 11 December 2008 filings and that the Rate Bureau and the Department had reached agreement on a negotiated disposition of the filings in question prior to 8 December 2008.

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1. The 2008 Rate Filing is approved subject to the modification set forth . . . below.
2. The revised territorial definitions . . . are approved.
3. The approved overall rate level increase is 3.9%. The approved territory rate level changes . . . are set forth on . . . Exhibit A. . . The resulting approved territory base class premiums . . . are set forth on . . . Exhibit B. Exhibits A and B are incorporated herein by reference.
4. The revised rates are to become effective . . . on or after May 1, 2009.
5. The parties acknowledge that by entering into this Consent Order neither is condoning . . . or agreeing to the other's theories, methodologies or calculations regarding . . . profit, . . . territory risk load, and/or any other theory, methodology or calculation . . . [and that] by entering into this Consent Order neither is bound or limited in . . . any future rate filings . . . subject to the Bureau's jurisdiction by the theories, methodologies or calculations . . . [in] the 2008 Rate Filing.
6. The Bureau acknowledges the Department's position that by entering into this Consent Order the Department is not validating or accepting the computer model used in the 2008 Rate Filing . . . [or] committing to use computer modeling in future rate filings. The parties agree that they will diligently meet and consult with each other to analyze data with respect to areas of the state with chronically high loss costs, will review computer models of North Carolina's vulnerability to hurricanes and other wind losses and will generally analyze the data as to this line of insurance in an effort to resolve their remaining differences, all to the end that rates be set and maintained both statewide and by territory that are neither excessive, inadequate nor unfairly discriminatory, and that the availability of insurance at actuarially appropriate rate levels is enhanced.

The basic effect of the Commissioner's decision to approve the settlement embodied in the consent order was to raise statewide average homeowners' insurance rates by 3.89%, to raise rates for property owners in coastal territories by 6.5% to 29.8%, and to reduce rates for condominium owners and tenants in coastal territories by 2% to 25%. The consent order also divided one of the territories used to establish

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rates for homeowners' insurance located in the coastal area into two separate territories.

After the issuance of the consent order, Petitioners initiated three different proceedings for the purpose of obtaining review of the consent order and of the proceedings that led to its adoption, two of which are involved in the present appeal. We will discuss the history of each of those proceedings in turn.

3. Petitioners' Direct Appeal

Petitioners noted an appeal from the consent order to this Court on 20 January 2009. The basis for Petitioner's attempt to directly appeal the consent order to this Court hinged on N.C. Gen. Stat. § 58-2-80 (2009), which provides that:

Any order or decision of the Commissioner that the premium rates charged or filed on all or any class of risks are excessive, inadequate, unreasonable, unfairly discriminatory or are otherwise not in the public interest or that a classification or classification assignment is unwarranted, unreasonable, improper, unfairly discriminatory or not in the public interest may be appealed to the North Carolina Court of Appeals by any party aggrieved thereby. . . .

On 20 April 2010, we filed an opinion holding that Petitioners were not entitled to directly appeal the consent order to this Court pursuant to N.C. Gen. Stat. § 58-2-80, which reasoned that:

The plain language of N.C. Gen. Stat. § 58-2-80 limits direct appeals of rate changes to this Court to “[a]ny order or decision of the Commissioner that the premium rates charged or filed on all or any class of risks are excessive, inadequate, . . . or are otherwise not in the public interest[.]” . . . [T]he Commissioner would only issue an order with the requisite findings after presiding over a contested hearing on a rate filing. This Court cannot assume jurisdiction over any order of the Commissioner that does not include those requisite findings without acting contrary to the plain language of N.C. Gen. Stat. § 58-2-80.

Dare County I, — N.C. App. at —, 692 S.E.2d at 158. As a result, since the consent order lacked the findings required to trigger application of N.C. Gen. Stat. § 58-2-80, this Court held that it lacked subject matter jurisdiction over Petitioners' direct appeal from the consent order and dismissed it.

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4. Petitioners' Request for Relief from the Commissioner

On 16 January 2009, Petitioners Dare County, Town of Nags Head, Starco Realty & Construction, Inc., Joseph M. Geraghty, Washington County, Currituck County, Hyde County, the Town of Duck, the Town of Southern Shores, and the Town of Indian Beach filed a motion to “intervene in the proceedings resulting in the 18 December 2008 [consent order].” Petitioners asserted that they were “entitled to intervention as [a matter] of right pursuant to [N.C. Gen. Stat. § 1A-1,] Rule 24(a)(2),” and that they were “‘persons aggrieved’ within the meaning of [N.C. Gen. Stat. §] 150B-2(6).” In addition, Petitioners requested a hearing “in the event that any party oppose[d] their intervention” and moved that, in the event that Respondents contended that the proceedings were closed, “these proceedings be re-opened[.]” Petitioners also sought a “hearing with the Department [of Insurance]” on “all issues arising in connection with” the consent order, a hearing pursuant to N.C. Gen. Stat. § 1A-1, Rule 60, and reconsideration of the consent order. Petitioners’ motion was assigned File No. 09 CvS 7841 in the Wake County Superior Court and Case No. COA09-1171 on appeal before this Court. On 19 March 2009, Petitioners moved for the entry of an order staying the implementation of the consent order.

On 19 March 2009, Petitioners Brunswick County, Carteret County, Chowan County, Kure Beach, New Hanover County, Perquimans County, Tyrrell County, Town of Carolina Beach, Town of Cedar Point, Town of Emerald Isle, Town of Kill Devil Hills, and Town of Pine Knoll Shores moved to intervene in the proceedings before the Commissioner in reliance on the arguments advanced in the motions previously filed by the other Petitioners. The record does not indicate that a hearing was held on the motion filed by the second group of Petitioners; however, the petition for judicial review filed in connection with this proceeding indicates that it was filed by all Petitioners.

The Rate Bureau and the Department moved to dismiss Petitioners’ petition on 26 January 2009 and 16 February 2009, respectively. In seeking dismissal of Petitioners’ filings, the Rate Bureau and the Department argued that there was no longer an ongoing proceeding in which Petitioners could intervene, that Petitioners were not “aggrieved” parties, and that the filed rate doctrine barred further review by the Commissioner.

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On 7 April 2009, a hearing was conducted before Department of Insurance Hearing Officer William K. Hale. On 16 April 2009, Hearing Officer Hale issued an order³ denying and dismissing Petitioners' request to intervene, request for a hearing, request for reconsideration, and motion to stay the implementation of the consent order. On 20 April 2009, Petitioners filed a petition seeking judicial review of Hearing Officer Hale's order in the Wake County Superior Court.

5. Petitioners' Petitions for Judicial Review in Superior Court

On 20 January 2009, Petitioners⁴ filed a petition in the Wake County Superior Court seeking judicial review of the consent order, the entry of a judgment declaring that the Commissioner erred, the issuance of a writ directing the Commissioner to hold a public hearing, and the entry of an order staying implementation of the rates approved by the consent order. This petition was assigned Case No. 09-CVS-1073 in the trial court and Case No. COA09-1172 before this Court.

On 16 February 2009, the Department and the Commissioner filed a motion to dismiss Petitioners' judicial review petitions pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(1) and 12(b)(6) (2009), for lack of subject matter jurisdiction and for failure to state a claim for relief. The Rate Bureau filed a similar dismissal motion on 20 March 2009.

On 20 April 2009, Petitioners filed a petition in Wake County Superior Court⁵ seeking judicial review of Hearing Officer Hale's order. On 22 April 2009, the Department, the Commissioner, and the Rate Bureau moved to dismiss this petition for several reasons, including a contention that N.C. Gen. Stat. § 58-2-53 "eliminates Petitioners from the categories of persons who may seek judicial review of rate-making decisions" of the Commissioner.

3. According to N.C. Gen. Stat. § 58-2-55, the Commissioner is authorized to "designate a member of his staff to serve as a hearing officer." According to 11 N.C.A.C. § 01.0416, a hearing officer has the authority to hear and rule on motions. As a result, the order entered by Hearing Officer Hale constitutes the Commissioner's final decision concerning Petitioners' motions.

4. This petition was filed by Petitioners Dare County, Washington County, Currituck County, Hyde County, Carteret County, Town of Nags Head, Town of Southern Shores, Town of Duck, Town of Pine Knoll Shores, Town of Indian Beach, Town of Kill Devil Hills, Starco Realty & Construction, Inc., and Joseph M. Geraghty.

5. This petition was filed by all Petitioners.

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On 23 April 2009, the trial court conducted a hearing on the dismissal motions and on Petitioners' motion to stay implementation of the consent order. On 29 April 2009, the trial court entered an order dismissing Petitioners' petitions and denying their stay motions on the grounds that the trial court lacked subject matter jurisdiction and that Petitioners lacked standing to seek review of the consent order. The trial court's order stated, in pertinent part, that:

THE ABOVE-CAPTIONED MATTERS (09 CVS 1073 and 09 CVS 7841) HAVING COME ON FOR HEARING . . . on Motions to Dismiss filed by the North Carolina Rate Bureau . . . and the [Commissioner] . . . through which Motions to Dismiss the Rate Bureau, Department and Commissioner assert the following:

(1) That Petitioners lack standing to pursue the relief sought through Petitioners' Petition for Judicial Review, Complaint for Declaratory Judgment, Writ, and Motion for Stay of Administrative Decision in File 09 CVS 1073;

(2) That Petitioners lack standing to pursue the relief sought through Petitioners' Verified Petition for Judicial Review, Motion for Stay, and Request for Declaratory Judgment and Writ in File 09 CVS 7841; and

(3) That this Court lacks subject matter jurisdiction to consider the Petitioners' claims in Files 09 CVS 1073 and 09 CVS 7841.

THE PETITIONERS also brought on for hearing . . . their Motions to Stay in Files 09 CVS 1073 and 09 CVS 7841.

AND THE COURT having fully considered the record and all the pleadings, memoranda, exhibits, and affidavits of the parties, . . . in each File 09 CVS 1073 and 09 CVS 7841, and having further considered the arguments of counsel . . . ;

THE COURT is of the opinion that this Court lacks subject matter jurisdiction to consider the claims asserted by the Petitioners in Files 09 CVS 1073 and 09 CVS 7841, and is of the further opinion that Petitioners[] lack standing to pursue the claims and seek the relief asserted by them in Files 09 CVS 1073 and 09 CVS 7841, and that Respondents' Motions to Dismiss should therefore be allowed.

WHEREFORE, IT IS HEREBY ORDERED AS FOLLOWED:

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1. Respondents' Motions to Dismiss are hereby allowed on the grounds set forth within this Order;
2. Petitioners' Petition for Judicial Review, Complaint for Declaratory Judgment, Writ, and Motion for Stay of Administrative Decision in File 09 CVS 1073 is hereby dismissed for lack of subject matter jurisdiction and lack of standing on the part of Petitioners to pursue the claims and seek the relief asserted in that action;
3. Petitioners' Verified Petition for Judicial Review, Motion for Stay, and Request for Declaratory Judgment and Writ in File 09 CVS 7841 is hereby dismissed for lack of subject matter jurisdiction and lack of standing on the part of Petitioners to pursue the claims and seek the relief asserted in that action.
4. Petitioners' Motions to Stay in Files 09 CVS 1073 and 09 CVS 7841 cannot be considered by this Court due to the Court's lack of subject matter jurisdiction and the Petitioners' lack of standing, and those Motions to Stay are rendered moot by the Court's dismissal through this Order of the Petition and Verified Petition in Files 09 CVS 1073 and 09 CVS 7841, respectively.

Petitioners noted two separate appeals to this Court from the trial court's order, which were assigned Case Nos. COA09-1171 (the appeal from the trial court's order dismissing Petitioners' request for review of Hearing Officer Hale's order) and COA09-1172 (the appeal from the trial court's order dismissing Petitioner's request for review of the consent order). As a result of the fact that these two appeals arose from a common set of facts and involved common issues of law, this Court consolidated the two appeals for purposes of briefing, argument, and decision on 19 November 2009. *See* N.C.R. App. P. 40 (2009) (stating that "[t]wo or more actions that involve common issues of law may be consolidated for hearing . . . upon the initiative of [the appellate] court").

II. Legal Analysis

A. Standard of Review

The trial court dismissed Petitioners' review petitions for lack of subject matter jurisdiction.⁶ "Subject matter jurisdiction refers to the

6. In examining Petitioners' arguments on appeal, we note that they are addressed exclusively to issues relating to the validity of the decisions contained in the consent

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power of the court to deal with the kind of action in question” and is “conferred upon the courts by either the North Carolina Constitution or by statute.” *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987). “[T]he standard of review on a motion to dismiss under Rule 12(b)(1) for lack of jurisdiction is *de novo*.” *State ex rel. Cooper v. Seneca-Cayuga Tobacco Co.*, 197 N.C. App. 176, 181, 676 S.E.2d 579, 583 (2009) (quoting *Hatcher v. Harrah’s N.C. Casino Co., LLC*, 169 N.C. App. 151, 155, 610 S.E.2d 210, 212 (2005)). “When reviewing a motion to dismiss for lack of subject matter jurisdiction pursuant to [N.C. Gen. Stat. § 1A-1,] Rule 12(b)(1), a trial court may consider and weigh matters outside the pleadings.” *Department of Trans. v. Blue*, 147 N.C. App. 596, 603, 556 S.E.2d 609, 617 (2001), *disc. review denied*, 356 N.C. 434, 572 S.E.2d 429 (2002).

B. Right to Judicial Review

The initial issue that we must address in evaluating Petitioners’ challenges to the trial court’s order is whether the trial court “had jurisdiction to hear and determine [Petitioners’] petitions for judicial review.” According to well-established provisions of North Carolina law:

There is no inherent or inalienable right of appeal from an inferior court to a superior court or from a superior court to the Supreme Court. *A fortiori*, no appeal lies from an order or decision of an administrative agency of the State . . . unless the right is granted by statute. . . . [T]he appeal must conform to the statute granting the right and regulating the procedure. The statutory requirements are mandatory and not directory. They are conditions precedent to obtaining a review by the courts and must be observed. Noncompliance therewith requires dismissal.

In re Employment Security Com., 234 N.C. 651, 68 S.E.2d 311 (1951) (citing *Cox v. Kinston*, 217 N.C. 391, 8 S.E.2d 252 (1940); *Caudle v. Morris*, 158 N.C. 594, 74 S.E. 98 (1912); *Brown v. Kress & Co.*, 207 N.C. 722, 178 S.E. 248 (1935); *Vivian v. Mitchell*, 144 N.C. 472 (1907); *Lindsey v. Knights of Honor*, 172 N.C. 818, 90 S.E. 1013 (1916) (other

order and do not challenge the lawfulness of Hearing Officer Hale’s decision denying their request to intervene in and reopen the proceedings before the Commissioner. For that reason, Petitioners did not preserve any issues pertaining to Hearing Officer Hale’s order for purposes of appellate review. See N.C.R. App. P. 28(a) (2009) (stating that “[i]ssues not-presented and discussed in a party’s brief are deemed abandoned”). As a result, the only issue before the Court at the present time is the extent to which the trial court properly dismissed Petitioners’ request for judicial review of the consent order on the merits.

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citations omitted). Although Petitioners' argue that the "legal principles governing administrative agencies . . . require that there be some avenue by which persons aggrieved can challenge an administrative decision," that assumption is simply not consistent with the applicable law. Instead, judicial review of the consent order is only available to Petitioners in the event that the General Assembly has enacted legislation that authorizes Petitioners to seek and obtain such review. Thus, the extent to which the trial court had subject matter jurisdiction over Petitioners' request for judicial review of the consent order depends upon whether the General Assembly has enacted any statutory provisions authorizing Petitioners to seek and obtain judicial review of the consent order.

"Insurance law in this state is governed by chapter 58 of the North Carolina General Statutes." *Gray v. North Carolina Ins. Underwriting Ass'n*, 352 N.C. 61, 68, 529 S.E.2d 676, 681 (2000). Several provisions of Chapter 58 address the extent of a person's right to obtain judicial review of an order or decision by the Commissioner. The Administrative Procedure Act includes provisions relating to the issue of judicial review of agency action as well. "[It is] a fundamental canon of statutory construction that statutes which are *in pari materia*, *i.e.*, which relate or are applicable to the same matter or subject, although enacted at different times must be construed together in order to ascertain legislative intent." *Carver v. Carver*, 310 N.C. 669, 674, 314 S.E.2d 739, 742 (1984) (citing *Media, Inc. v. McDowell County*, 304 N.C. 427, 284 S.E.2d 457 (1981) (other citations omitted)). Since the issue of whether the trial court had subject matter jurisdiction over Petitioners' challenges to the consent order implicates statutes found in both Chapter 58 of the North Carolina General Statutes and the Administrative Procedure Act, we must, therefore, consider the relevant statutory provisions *in pari materia*.

The Administrative Procedure Act sets out "a uniform system of administrative rule making and adjudicatory procedures for agencies." N.C. Gen. Stat. § 150B-1(a) (2009). "In North Carolina, disputes between a state government agency and another person may be formally resolved with the filing of an administrative proceeding referred to as a 'contested case.'" *N.C. Forestry Ass'n v. N.C. Dep't of Env't & Natural Res.*, 357 N.C. 640, 644, 588 S.E.2d 880, 883 (2003). "The contested case provisions of [the Administrative Procedure Act] apply to all agencies and all proceedings not expressly exempted[.]"

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N.C. Gen. Stat. § 150B-1(e). The “Department of Insurance is a state agency and as such is subject to the Administrative Procedure Act (APA), [N.C. Gen. Stat.] §§ 150B-1 to -52 (1991).” *In re Appeal by McCrary*, 112 N.C. App. 161, 164, 435 S.E.2d 359, 362 (1993). As a result, “[w]hen faced with an appeal from a decision of an administrative agency [subject to the Administrative Procedure Act], courts should first turn to the” relevant provisions of that legislation. *In re Kapoor*, 303 N.C. 102, 104-05, 277 S.E.2d 403, 406 (1981) (citing N.C. Gen. Stat. § 150A-43 (1978) [replaced by N.C. Gen. Stat. § 150B-43]).

The principal statutory provision concerning the extent of the right of a person to obtain judicial review of an administrative decision contained in the Administrative Procedure Act is N.C. Gen. Stat. § 150B-43 (2009), which provides that:

Any person who is aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of the decision under this Article, unless adequate procedure for judicial review is provided by another statute[.]

As a result, under N.C. Gen. Stat. § 150B-43:

a party must satisfy five requirements [in order to seek and obtain judicial review of an adverse administrative action]: ‘(1) the person must be aggrieved; (2) there must be a contested case; (3) there must be a final agency decision; (4) administrative remedies must be exhausted; and (5) no other adequate procedure for judicial review can be provided by another statute.’

Department of Transp. v. Blue, 147 N.C. App. at 605, 556 S.E.2d at 618 (quoting *Huang v. N.C. State University*, 107 N.C. App. 710, 713, 421 S.E.2d 812, 814 (1992)). Thus, the “[Administrative Procedure Act] allows judicial review of a final agency decision in a contested case when all relevant administrative remedies have been exhausted and there is no adequate judicial review provided under any other statute.” *In re Kapoor*, 303 N.C. at 104-05, 277 S.E.2d at 406. In light of the clear statutory requirement that persons seeking judicial review of an adverse administrative action utilize the relevant provisions of the Administrative Procedure Act “unless adequate procedure for judicial review is provided by another statute,” N.C. Gen. Stat. § 150B-43, we must first determine whether the requirements set out in N.C. Gen. Stat. § 150B-43 are adequately addressed in the judi-

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cial review provisions contained in Chapter 58 of the North Carolina General Statutes.⁷

Petitioners contend that their right to judicial review stems from N.C. Gen. Stat. § 58-2-75,⁸ which provides that:

Any order or decision made . . . by the Commissioner . . . except an order or decision that the premium rates charged or filed on all or any class of risks are excessive, inadequate, unreasonable, unfairly discriminatory or are otherwise not in the public interest . . . shall be subject to review in the Superior Court of Wake County on petition by any person aggrieved filed within 30 days from the date of the delivery of a copy of the order or decision made by the Commissioner upon such person. . . .

In essence, Petitioners argue that, since they are “aggrieved” persons and since the Commissioner did not find that the existing homeowners’ insurance rates were “excessive, inadequate, unreasonable, unfairly discriminatory or [were] otherwise not in the public interest,” they are entitled to obtain review of the consent order in the Wake County Superior Court pursuant to N.C. Gen. Stat. § 58-2-75. We do not, however, believe that Petitioners’ analysis addresses all of the issues that must be considered in determining whether they are entitled to judicial review of the consent order pursuant to N.C. Gen. Stat. § 58-2-75.

7. Petitioners emphasize the *caveat* set forth in N.C. Gen. Stat. § 150B-43 referring to “adequate provisions for judicial review [being] provide[d] by another statute.” In making this argument, Petitioners appear to be contending that any construction of the relevant statutory provisions that does not afford all aggrieved persons with a right to seek and obtain judicial review of the consent order renders those statutory provisions “inadequate” for purposes of N.C. Gen. Stat. § 150B-43. However, given that N.C. Gen. Stat. § 58-2-80 provides that a “party aggrieved” has a right to appeal a rate order entered by the Commissioner to this Court and given that no one appears to contend that the right of review granted by N.C. Gen. Stat. § 58-2-80 is inadequate, we do not believe that allowing all persons aggrieved, regardless of whether they sought and obtained party status before the Commissioner, is necessary for a review procedure to be “adequate.”

8. In their brief, Petitioners note that N.C. Gen. Stat. § 58-36-25(a) (2009) provides that “[a]ny order or decision of the Commissioner shall be subject to judicial review as provided in Article 2 of this Chapter.” Although Petitioners concede that this statute is found in the portion of Chapter 58 of the General Statutes governing the operation of the Rate Bureau, they nonetheless assert that their own right to review can be located by “[f]ollowing this express statutory cross-reference[.]” However, since N.C. Gen. Stat. § 58-36-25 applies to the Rate Bureau and expressly indicates that it is subject to the provisions of Article 2 of Chapter 58, this particular statutory provision does not add anything to the analysis that must be conducted in order to determine the extent of Petitioners’ rights to obtain judicial review of the consent order.

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According to N.C. Gen. Stat. § 58-2-53 (2009):

Whenever any provision of this Chapter requires a person to file rates, forms, classification plans, rating plans, . . . or any other item with the Commissioner or Department for approval, the approval or disapproval of the filing is an agency decision under Chapter 150B of the General Statutes only with respect to the person making the filing or any person that intervenes in the filing.

In other words, N.C. Gen. Stat. § 58-2-53 states that an order providing for the filing of “rates, forms, classification plans, rating plans, . . . or any other item with the Commissioner or Department for approval” is not a final order with respect to any person or entity that did not make the filing under consideration in that proceeding or “intervene[] in the filing.” In this case, the record clearly reflects that the Rate Bureau submitted a filing seeking to obtain the Commissioner’s approval for altered homeowners’ insurance rates and that the consent order entered by the Commissioner expressly provided that “[t]he 2008 Rate Filing is approved subject to the modification set forth . . . below.” Thus, the Rate Bureau was the “person making the filing” for purposes of this proceeding, so the consent order was “an agency decision under Chapter 150B” with respect to that entity. The record also reflects that no party, including Petitioners, intervened or attempted to intervene in the proceeding resulting from the Rate Bureau’s filing prior to the entry of the consent order. As a result, in light of the plain language of N.C. Gen. Stat. § 58-2-53, the consent order was “an agency decision . . . only with respect to” the Rate Bureau and not with respect to Petitioners.⁹

As we have already noted, the existence of a “final agency decision” is one of the prerequisites for obtaining judicial review of an administrative order. *Huang*, 107 N.C. App. at 713, 421 S.E.2d at 814

9. Petitioners argue that the reference in N.C. Gen. Stat. § 58-2-53 to a “person that intervenes in the filing” should be understood to refer to persons that sought leave to intervene, rather than to persons actually granted intervenor status. However, we do not find this construction of N.C. Gen. Stat. § 58-2-53 persuasive for purposes of deciding this case, since it would have the effect of granting the right to seek judicial review to a party that did not seek leave to participate in the proceedings before the Commissioner prior to the entry of the consent order and since we do not believe that the relevant statutory language supports such an interpretation. Although we tend to agree that a person who unsuccessfully sought leave to intervene prior to the entry of the Commissioner’s order should be afforded a right to seek judicial review of the decision to deny that party’s request for leave to intervene, we need not decide that issue at this time given that no request for leave to intervene was submitted to the Commissioner prior to the entry of the consent order and since Petitioners have not challenged Hearing Officer Hale’s decision to deny their intervention petitions before this Court.

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(stating that “before a party may ask a court to rule on an adverse administrative determination . . . there must be a final agency decision.”) Although N.C. Gen. Stat. § 58-2-75 does not explicitly refer to the necessity for such an “agency decision” in order for an aggrieved party to seek review of a decision by the Commissioner, that fact, standing alone, does not mean that orders entered by the Commissioner are exempt from the “agency decision” requirement. On the contrary, this Court has held that, “[w]hile [N.C. Gen. Stat.] § 58-2-75 (1991) also provides for judicial review of a decision of the Commissioner, this Court has determined [N.C. Gen. Stat.] § 150B-51 of the [Administrative Procedure Act] to be controlling” and has stated that, “[t]o the extent that [N.C. Gen. Stat.] § 58-2-75 adds to and is consistent with [the Administrative Procedure Act], we will proceed by applying the review standards articulated in both statutes.” *McCrary*, 112 N.C. App. at 164, 435 S.E.2d at 362 (quoting *N.C. Reinsurance Facility v. Long*, 98 N.C. App. 41, 46, 390 S.E.2d 176, 179 (1990)). Thus, a determination of the extent to which a decision by the Commissioner must be an “agency decision” for purposes of the Administrative Procedure Act in order for that decision to be subject to judicial review requires “applying the review standards articulated in both N.C. Gen. Stat. § 58-2-75 and N.C. Gen. Stat. § 150B-43.”¹⁰

The language of N.C. Gen. Stat. § 58-2-75, which purports to allow review of “[a]ny order or decision” of the Commissioner, would, if construed literally, eliminate any necessity for the order or decision subject to judicial review to constitute an “agency decision” or a “final agency decision.” Any such interpretation of N.C. Gen. Stat. § 58-2-75 would contradict the provisions of the Administrative Procedure Act governing judicial review and be inconsistent with the rules requiring exhaustion of administrative remedies as a precondition for obtaining judicial review and precluding review of interlocu-

10. Admittedly, N.C. Gen. Stat. § 150B-51 deals with the standard of review to be applied in connection with the judicial review of administrative action, while N.C. Gen. Stat. § 150B-43 addresses the availability of judicial review. However, an examination of N.C. Gen. Stat. § 150B-51 also indicates that a final agency decision is a prerequisite for judicial review of an administrative order. In addition, N.C. Gen. Stat. § 150B-51 is only one of a number of statutory provisions dealing with judicial review that address subjects ranging from the right to review, N.C. Gen. Stat. § 150B-43, to the procedures to be utilized during the judicial review process, N.C. Gen. Stat. §§ 150B-45, 46, 47, 48, 49, 50, to the scope of the review to be conducted by the reviewing court, N.C. Gen. Stat. § 150B-51. As a result, we have no hesitation in saying that, under the logic of *McCrary*, we must apply the standards set out in N.C. Gen. Stat. § 150B-51 in addition to those set out in N.C. Gen. Stat. § 58-2-75 in determining whether Petitioners have a right to seek judicial review of the consent order.

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tory orders.¹¹ For that reason, construing N.C. Gen. Stat. § 58-2-75 to allow appeals from orders that did not constitute an “agency decision” or a “final agency decision” would conflict with the requirement that appeals taken from orders entered by the Commissioner be governed by the standards set forth in both N.C. Gen. Stat. § 58-2-75 and the relevant provisions of the Administrative Procedure Act. Thus, we conclude that a request for judicial review pursuant to N.C. Gen. Stat. § 58-2-75 may only be taken from an “agency decision” or a “final agency decision.” We further conclude that, because Petitioners were neither the “person making the filing” nor “any person that intervenes in the filing,” N.C. Gen. Stat. § 58-2-53 explicitly makes the consent order not an “agency decision” with respect to Petitioners, a fact that precludes them from seeking judicial review of the consent order under either N.C. Gen. Stat. § 150B-43 or N.C. Gen. Stat. § 58-2-75. As a result, the trial court correctly concluded that it did not have subject matter jurisdiction over Petitioners’ request for judicial review of the consent order and dismissed Petitioners’ petitions.¹²

We have considered and rejected Petitioners’ other arguments pertaining to their right to obtain judicial review of the consent order in the Wake County Superior Court. For example, Petitioners argue that an order by Judge William R. Pittman in a case involving the BEACH and FAIR Plans lends “[f]urther support for [their] interpretation” of certain relevant statutes. However, Judge Pittman’s order was entered in a different proceeding involving a separate set of statutory provisions, so that it has no direct bearing on this case. In addition, we are not persuaded by Petitioners’ argument that the only purpose of N.C. Gen. Stat. § 58-2-53 is to preclude collateral attacks on orders entered by the Commissioner, since nothing in the language of N.C. Gen. Stat. § 58-2-53 limits the application of that statutory pro-

11. The necessity for interpreting N.C. Gen. Stat. § 58-2-75 and the relevant provisions of the Administrative Procedure Act consistently is highlighted by the fact that N.C. Gen. Stat. § 58-2-70 explicitly provides that, “[u]nless otherwise specifically provided for, all administrative proceedings conducted pursuant to this Chapter are governed by Chapter 150B of the General Statutes” and the fact that, in judicial review proceedings conducted pursuant to N.C. Gen. Stat. § 58-2-75, the reviewing court is required to conduct its review of the Commissioner’s order using the scope of review provisions of the Administrative Procedure Act. *McCrary*, 112 N.C. App. at 164, 435 S.E.2d at 362.

12. The result we reach here, which makes judicial review pursuant to N.C. Gen. Stat. § 58-2-75 available to those persons or entities that participated in proceedings before the Commissioner, is consistent with the approach adopted in N.C. Gen. Stat. § 58-2-80, which provides that judicial review of certain rate-related orders is available to a “party aggrieved thereby.”

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vision to the collateral attack context. As a result, none of Petitioners' additional arguments in support of their contention that they have a right to judicial review of the consent order are persuasive given the procedural posture of this case.

We understand that the combination of our decision in this case and our decision in *Dare County I* results in a situation in which Petitioners are unable to challenge the lawfulness of the consent order by either direct appeal to this Court or by seeking judicial review in the Superior Court of Wake County. We believe, however, that balancing the appropriateness of allowing expeditious, informal, negotiated dispositions of matters before the Commissioner and requiring that judicial review of administrative orders be limited to entities that actually participated in the proceeding before the Commissioner with providing individuals, businesses, and other entities concerned about the level of insurance rates they are required to pay with a right to obtain judicial review of rate orders with which they are dissatisfied is a matter for the General Assembly and not for the judicial branch. As we read the relevant statutory provisions, Petitioners simply do not, given the fact that they did not participate in the proceedings before the Commissioner during the pendency of the rate filing, have the right to seek judicial review of the consent order in the Wake County Superior Court, so that the trial court correctly dismissed their review petitions for lack of subject matter jurisdiction.

III. Conclusion

Thus, for the reasons discussed above, we conclude that the trial court correctly determined that Petitioners did not have the right, under the relevant statutory provisions, to seek judicial review of the consent order in the Wake County Superior Court. In light of that determination, we need not determine whether Petitioners were "aggrieved" by the consent order, what impact the filed rate doctrine has on Petitioners' ability to obtain relief from any errors that the Commissioner may have committed, or whether Petitioners' other challenges to the lawfulness of the consent order have merit. As a result, the trial court's order should be, and hereby is, affirmed.

AFFIRMED.

Judges BRYANT and ELMORE concur.

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[207 N.C. App. 618 (2010)]

IN RE VICTORIOUS RONE BY AND THROUGH ARDEAL AND DIANNE ROSEBORO,
PETITIONERS V. WINSTON-SALEM/FORSYTH COUNTY BOARD OF EDUCATION,
RESPONDENT

No. COA09-1180

(Filed 2 November 2010)

1. Pleadings— amendment—petition for review of administrative ruling

The trial court did not err by allowing petitioners to amend their petition for judicial review pursuant to N.C.G.S. § 1A-1, Rule 15(a) to assert that a student was improperly assigned to an alternative school. Although respondent contended that the Administrative Procedure Act has no mechanism for amending a petition, the Rules of Civil Procedure apply when a differing procedure is not prescribed by statute.

2. Pleadings— motion to amend—awareness of claim—no prejudice

The trial court did not abuse its discretion by allowing petitioners' motion to amend where respondent was aware of petitioners' claim more than a month before the superior court hearing and was not materially prejudiced by the timing of the amendment.

3. Schools and Education— alternative learning center—review of assignment—plain language of policy

The trial court erred by concluding that a school board policy that required a superintendent-level review before a student was confined to an alternative learning center did not apply in this case. The plain language of the school board policies revealed that they applied to students assigned to alternative learning programs as an alternative to suspension or expulsion, as here.

4. Appeal and Error— Mootness—school board policy not followed—corrected next year

A high school student's appeals from his assignment to an alternative learning center were not moot. The fact that he was offered the required superintendent-level hearing for the next year's school assignment was irrelevant because his appeal concerned only the assignment for the prior year.

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5. Constitutional Law— due process—assignment to alternative learning center—evidentiary hearing not offered

The due process rights of a high-school student were violated where he was assigned to an alternative learning center without a superintendent-level review at which he could present evidence or cross-examine witnesses. The Board-level hearing later provided to petitioners was essentially an appellate hearing, conducted in this case without the superintendent-level or evidentiary hearing.

6. Schools and Education— assignment to alternative learning center—policy not followed—remedy

Under school policy, an assignment to an alternative learning center as an alternative to suspension could necessarily only last until the completion of that school year. An appellate determination that the assignment was erroneously made could no longer affect that assignment, nor could the Court of Appeals could grant petitioners' request that the student be ordered back into the regular class room immediately. However, the case was remanded for expungement of the assignment to the alternative program from the student's record.

Appeal by petitioners from order entered 21 July 2009 by Judge Ronald E. Spivey in Forsyth County Superior Court. Heard in the Court of Appeals 11 February 2010.

The Roseboro Law Firm, PLLC, by John Roseboro, for petitioners-appellants.

Womble Carlyle Sandridge & Rice, PLLC, by Reid C. Adams, Jr., and Gemma L. Saluta, for respondent-appellee.

Katherine J. Brooks, staff attorney, and Allison B. Schafer, legal counsel, for amicus curiae North Carolina School Boards Association.

CALABRIA, Judge.

Victorious Rone ("Rone"), by and through his grandparents and legal guardians Ardeal Roseboro ("Mr. Roseboro") and Dianne Roseboro ("Mrs. Roseboro") (collectively "petitioners") appeal the trial court's order affirming the Winston-Salem/Forsyth County School Board of Education's ("WSFCS," "the Board," or "respon-

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dent”) letter opinion of 9 October 2008 assigning Rone to an alternative school for the 2008-09 school year. We reverse and remand.

I. Background

During the 2007-08 school year, Rone was a ninth grade student at R.J. Reynolds High School (“RHS”) in Winston-Salem, North Carolina. On 14 May 2008, Rone threatened other students at RHS and drew a picture showing a female student being stabbed. The next day, RHS Assistant Principal Tony Mills (“Asst. Principal Mills”), Guidance Counselor Mary Anne McClain (“Ms. McClain”), and the school resource officer (“SRO”) met with petitioners, informed them of Rone’s threats, and showed them the drawing. Ms. McClain also told petitioners that students and teachers were concerned that Rone talked to an imaginary person named “Bob.” Mr. Roseboro replied that he felt that other students were “out to get” Rone and that the meeting was “an attempt for [other] students to start rumors about” Rone. Ms. McClain attempted to help Rone by recommending an evaluation by a WSFCS psychologist. Petitioners preferred to select someone of their own choosing rather than have Rone participate in the WSFCS psychological evaluation. Rone was subsequently suspended from RHS for two days, 15 and 16 May 2008, for communicating threats.

Rone returned to RHS on 19 May 2008. Upon his return, administrators found a drawing in Rone’s backpack that included the statement, “Are you ready? To die.” Asst. Principal Mills subsequently took statements from other students who felt threatened by Rone’s behavior. Students voiced concerns that Rone “talked about blood a lot” and “about hating . . . and killing people.” Students also stated that Rone tried to cut or stab himself during math class with a mathematical compass, and that Rone told a student he wanted to “kill everybody in [the] school . . . burn our corps[es] and then kill hi[m]self.”

On 20 May 2008, Asst. Principal Mills met with Mrs. Roseboro and told her that Rone’s in-school suspension (“ISS”) was a temporary placement until a risk assessment was performed. However, if petitioners refused the risk assessment, Rone would have to continue in either ISS or RHS’s Alternative Learning Center (“ALC”) for the remainder of the school year. Asst. Principal Mills explained to Mrs. Roseboro that the risk assessment was necessary to determine if Rone was a danger to himself or others.

Petitioners refused the risk assessment because Mr. Roseboro denied that Rone posed a threat to himself or others. Consequently,

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Rone remained in ISS for the remainder of the 2007-08 school year. While in ISS, Rone received his academic work in a closely supervised setting to minimize the risk to himself or others.

During the summer of 2008, respondent attempted to coordinate a meeting between the administrators of RHS and petitioners to discuss a resolution. Petitioners' counsel requested certain documents prior to scheduling a meeting. Respondent provided the documents in early July 2008 and continued to request a meeting. The meeting was finally held on 22 August 2008, the last day of RHS's summer break. Rone, Mrs. Roseboro, and petitioners' counsel attended, along with RHS Principal Art Paschal ("Principal Paschal"), WSFCS Assistant Superintendent Paul Puryear ("Asst. Superintendent Puryear"), and respondent's counsel.

On 25 August 2008, the first day of the 2008-09 school year, Asst. Superintendent Puryear assigned Rone to the ALC until completion of a risk assessment. Asst. Superintendent Puryear reiterated that the purpose of the risk assessment was to determine if Rone was a threat to himself or others at RHS. The decision to assign Rone to the ALC was based upon, *inter alia*, a Level 1 Screening Assessment ("the screening"),¹ Level II Risk Assessment Referrals ("the referrals") completed by two of Rone's teachers, Rone's two drawings, and ten statements and/or emails regarding matters pertaining to Rone's threats or potential psychological condition.

According to the screening completed by Ms. McClain, Rone displayed "some aggressive behavior" along with "violent fantasies, drawings, or comments." In addition, Rone "expressed threats or plans to harm self or others," seemed "unable to express or feel empathy, sympathy or remorse," had "delusional ideas, feelings of persecution, or command hallucinations[;] [a]cted on beliefs," had "evidence of plan (drawings, writings); able to identify others who overheard talking about revenge or attack," and that "multiple concerns [have been] expressed by others; people fearful."

The referrals, completed by two of Rone's teachers, found that Rone was "socially withdrawn," had "excessive feelings of isolation and being alone," displayed uncontrolled anger, talked or wrote about violence or death, "seem[ed] depressed; cries easily, sleeps, etc.," engaged in "self-injurious behavior or threats (spoken or written) of

1. This low-level screening is not the risk assessment performed by the psychologist requested by the Board.

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suicide” and “serious threats of violence toward others,” and “communicated a threat directly to his target.” One teacher observed that Rone would “rock back and forth to soothe himself,” “hit himself in the head repeatedly or bang[] his head on a desk/blackboard repeatedly,” and “scratch[] himself with a compass in class.” Another teacher noted that Rone threatened and had “several ‘heated’ interactions” with other students in class when they asked him to be quiet when he talked to “Bob.” Asst. Superintendent Puryear offered to have the risk assessment performed by a WSFCS psychologist at no cost to petitioners. However, petitioners again refused to allow any WSFCS psychologist to examine Rone and also refused to seek a private risk assessment performed at their own expense.

On 28 August 2008, petitioners’ attorney requested a hearing to appeal the ALC assignment. In response, respondent scheduled a hearing for 2 September 2008. When petitioners requested an October hearing, the hearing was scheduled and held on 7 October 2008 before a three-person hearing panel of the Board (“the Board Panel”). Asst. Superintendent Puryear, Principal Paschal, and Asst. Principal Mills were present and represented by counsel. Petitioners were also present and represented by counsel. Both parties presented evidence for fifteen minutes. During petitioners’ presentation, they presented a single witness on their behalf, Mr. Monty Gray (“Gray”), the ALC Facilitator/Teacher. In addition, petitioners also received a five-minute rebuttal period, during which they attempted to cross-examine Asst. Principal Mills. However, at the completion of the five-minute rebuttal period, petitioners’ cross-examination was not complete, but it was stopped by the Board Panel at that time. Petitioners were not allowed any additional time to cross-examine any witnesses or argue in rebuttal.

On 9 October 2008, the Board Panel issued an opinion that the matter was not “a discipline based assignment decision or a medical decision.” It concluded that there was a reasonable basis to suspect or believe that Rone “is or may be a danger to himself or others” at RHS. The Board Panel further upheld the decision of the RHS administrators to assign Rone to the ALC until a risk assessment was completed and Rone was deemed not to be a threat to himself or others.

On 10 November 2008, petitioners filed a Petition for Judicial Review in Forsyth County Superior Court, alleging Rone’s assignment to the ALC: (1) violated the United States and North Carolina Constitutions; (2) violated state law and local board policy; (3) was

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made upon unlawful procedure; (4) was affected by other errors of law; (5) was unsupported by substantial evidence; and (6) was arbitrary and capricious. Petitioners asked that respondent's decision upholding Rone's assignment to the ALC be reversed and that respondent be ordered to immediately return Rone to regular classes. On 11 March 2009, petitioners filed a Motion to Amend the Petition for Judicial Review ("Motion to Amend"), which the trial court granted on 26 March 2009. The Motion to Amend added to the Petition for Judicial Review the additional allegation that respondent denied petitioners a superintendent-level hearing, as required by respondent's policies. On 21 July 2009, the trial court affirmed respondent's decision assigning Rone to the ALC pending a risk assessment. Petitioners appeal.

II. Standard of Review

"[A] reviewing superior court sits in the posture of an appellate court and does not review the sufficiency of evidence presented to it but reviews that evidence presented to the [local board]." *In re Alexander v. Cumberland Cty. Bd. of Educ.*, 171 N.C. App. 649, 653-54, 615 S.E.2d 408, 413 (2005) (internal quotations omitted) (quoting *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 12, 565 S.E.2d 9, 17 (2002)). "The proper standard for the superior court's judicial review depends upon the particular issues presented on appeal." *Id.* at 654, 615 S.E.2d at 413 (internal quotations and citations omitted). Pursuant to N.C. Gen. Stat. § 150B-51(b) (2008):

In reviewing a final decision, the court may affirm the decision of the agency or remand the case to the agency or to the administrative law judge for further proceedings. It may also reverse or modify the agency's decision, or adopt the administrative law judge's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional provisions;

...

(3) Made upon unlawful procedure[.]

Id. (quoting N.C. Gen. Stat. § 150B-51). Where the assigned error is that the school board violated N.C. Gen. Stat. § 150B-51(b)(1) or (3), a court engages in *de novo* review. *Id.* (citation omitted). "Under the *de novo* standard of review, the trial court considers the matter anew and freely

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substitutes its own judgment for the agency's." *Id.* (internal quotations, citation, and brackets omitted). When an appellate court reviews

a superior court order regarding an agency decision, "the appellate court examines the trial court's order for error of law. The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly."

Id. at 655, 615 S.E.2d at 413 (quoting *Mann Media, Inc.*, 356 N.C. 14, 565 S.E.2d at 18).

In the instant case, there is no dispute that the trial court exercised the appropriate scope of review. Instead, petitioners challenge only the trial court's *de novo* review of Rone's procedural due process claims.

III. Amendment of Petition

[1] Initially, we address respondent's cross-assignment of error that the superior court erred in allowing petitioners to amend their petition for judicial review in order to assert that Rone was erroneously denied a superintendent-level hearing. We disagree.

The North Carolina Rules of Civil Procedure "govern the procedure in the superior . . . courts of the state of North Carolina in all actions and proceedings of a civil nature except when a differing procedure is prescribed by statute." N.C. Gen. Stat. § 1A-1, Rule 1 (2008). N.C. Gen. Stat. § 1A-1, Rule 15(a) (2009) ("Rule 15(a)") allows pleadings to be amended. Under Rule 15(a), leave to amend should be freely granted. *Bartlett Milling Co. v. Walnut Grove Auction & Realty Co.*, 192 N.C. App. 74, 89, 665 S.E.2d 478, 490, *disc. review denied*, 362 N.C. 679, 669 S.E.2d 741 (2008). The decision to allow a motion to amend under Rule 15(a) is directed to the sound discretion of the superior court and is accorded great deference. *Id.* The exercise of the superior court's discretion cannot be disturbed on appeal absent a clear showing of abuse of discretion. *Id.* The burden is on the opposing party to establish that it was materially prejudiced by an amendment. *Mosley & Mosley Builders v. Landin LTD.*, 97 N.C. App. 511, 516, 389 S.E.2d 576, 579 (1990).

Respondent contends that the superior court erred in allowing petitioners' Motion to Amend because N.C. Gen. Stat. § 150B-1 *et seq.*, the North Carolina Administrative Procedure Act ("APA"), has no "mechanism that allows a petitioner to amend his or her petition." However, the Rules of Civil Procedure apply to all proceedings in superior court

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“except when a differing procedure is prescribed by statute.” N.C. Gen. Stat. § 1A-1, Rule 1. There are no provisions in the APA that either permit or forbid an amendment to a petition for judicial review. Since an amendment procedure is not found in the APA, the superior court properly applied Rule 15(a) in the instant case.

[2] Respondent next contends petitioners’ amendment was unduly delayed because petitioners filed their Motion to Amend on 11 March 2009, a few days after the Board served its superior court brief on 6 March 2009. Additionally, respondent complains that the superior court did not rule on the Motion to Amend until immediately before the hearing on the petition for judicial review. Finally, respondent argues that the lack of a superintendent-level hearing was not presented as an issue before the Board. Thus, respondent contends, allowing the Motion to Amend would “frustrate the adversarial process.”

N.C. Gen. Stat. § 150B-51(b)(3) (2008) specifically allows a petitioner to challenge any decision by an administrative body that was made upon unlawful procedure before the superior court. The Petition for Judicial Review filed by petitioners on 10 November 2008 alleged that respondent’s decision was made upon unlawful procedure, although it did not specifically assert respondent’s failure to provide petitioners with a superintendent-level hearing. However, both respondent’s appellate brief and its opposition to petitioners’ Motion to Amend indicate that petitioners initially raised the issue in their brief to the superior court on 4 February 2009. Petitioners’ Motion to Amend alleged that respondent’s brief addressed this argument, and respondent asserts that it noted in its brief to the superior court that petitioners’ claim regarding the absence of a superintendent hearing was not raised in the Petition for Judicial Review.² Based on the information in respondent’s opposition to the Motion to Amend, respondent was aware of petitioners’ claim regarding a superintendent-level hearing more than a month before the superior court hearing on 20 March 2009. Thus, we do not believe the timing of petitioners’ amendment materially prejudiced respondent. Because the Motion to Amend was not unduly

2. Although both parties rely upon the content of respondent’s superior court briefs in their respective arguments on this issue, neither petitioners’ nor respondent’s brief is included in the record on appeal. As a result, we are unable to verify the contents of these briefs. Although our resolution of this issue did not require any information contained in these superior court briefs, we remind respondent, who raised this issue as a cross-assignment of error, that our appellate rules require the record on appeal to contain “all other papers filed and statements of all other proceedings had in the trial court which are necessary to an understanding of all [cross-]errors assigned . . .” N.C.R. App. P. 9(a)(1)(j) (2008).

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delayed and N.C. Gen. Stat. § 150B-51(b)(3) specifically allows a petitioner to challenge a decision by an administrative body that was made upon an unlawful procedure, we determine that the trial court did not abuse its discretion by allowing petitioners' Motion to Amend. This cross-assignment of error is overruled.

IV. Procedural Due Process

A. School Board Policy

[3] Petitioners argue that Rone's due process rights were violated because respondent's Policy 5131, which requires a superintendent-level hearing before a student is confined to an ALC, applies in the instant case and was not followed by respondent. Thus, respondent contends, the superior court erred by concluding that Policy 5131 did not apply to Rone. We agree.

Policy 5118 governs "Assignment To Alternative Schools: Conditions for Assignment." By its terms, Policy 5118 "applies to assignments to alternative programs *that are an alternative to suspension from school* for up to the remainder of the school year or for 365 days or an alternative to expulsion." (emphasis added). Article VII.A of Policy 5118, titled "Due Process Procedures," states:

- A. Students recommended for an assignment to an alternative school or the ALC program at a regular high school as an alternative to suspension are entitled to a due process hearing regarding that recommendation as provided by Policy 5131.

Policy 5118, Art. VII.A (emphasis added). Under Policy 5131, Art. VI.C:

The principal may recommend to the superintendent the assignment of a student to an alternative school (or program) or a suspension of a student from all school programs for a period in excess of ten school days but not exceeding the time remaining in the school year if the student willfully violates the rules of conduct established by or in accordance with this policy.

Policy 5131, Art. VI.C.1. Policy 5131, Article VI.C.3 and 5 subsequently provide for a superintendent-level hearing and its accompanying due process procedures for students disciplined under Policy 5131, Article VI.C.1.

When the language of a school board policy is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the policy. *See North Carolina Dept. of Revenue v. Hudson*, — N.C.

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App. —, —, 675 S.E.2d 709, 710 (2009) (“Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning.”) (internal quotations and citation omitted). The plain language of Policies 5118 and 5131 reveals that they apply to students who have been assigned to alternative learning programs as an alternative to suspension or expulsion.

In the instant case, after petitioners’ initial refusal to submit to a risk assessment, Rone was placed in the ISS classroom for the remainder of the 2007-08 school year. When petitioners continued to refuse respondent’s request for a risk assessment, respondent then assigned Rone to the ALC until a risk assessment was completed. Since Rone had previously been suspended for his refusal to submit to a risk assessment, his assignment to the ALC for the exact same behavior necessarily constituted an alternative to suspension.

Additionally, although the Board Panel’s letter opinion of 9 October 2008 indicated that it did not consider Rone’s assignment to the ALC to be a disciplinary assignment, both Principal Puryear and the Board Panel’s letters informed petitioners that, pursuant to state law, Rone’s assignment to the ALC would remain in his cumulative record until five calendar years after Rone graduates or withdraws from school. The letters then informed petitioners of the procedure for expunging the assignment from Rone’s record. This expungement procedure was taken verbatim from N.C. Gen. Stat. § 115C-402 (2008), which permits expungement from a student’s record any “notice of suspension or expulsion.” The notice given to petitioners by both Principal Puryear and the Board Panel was the exact notice required by Policy 5131, Article VI.G, to be given “[w]hen notice is given to students or parents of a suspension of more than 10 days or expulsion[.]”

Rone’s placement in ISS at the end of the 2007-08 school year, coupled with the fact that petitioners were provided with the same procedures to remove the assignment from his student record as the procedures required to expunge a long-term suspension or expulsion from his student record, makes Rone’s assignment to the ALC “an alternative to suspension from school” under Policy 5118. As a result, petitioners were entitled to a due process hearing regarding that assignment as provided by Policy 5131, and the superior’s court conclusion of law that Policy 5131 was not applicable was error.

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B. Motion to Dismiss

[4] On 3 March 2010, respondent filed a Motion to Dismiss the Appeal, alleging that petitioners' appeal was moot because respondent offered petitioners a superintendent-level hearing regarding Rone's assignment to the ALC for the 2009-10 school year. We have determined that Rone was assigned to the ALC as an alternative to suspension and that his assignment therefore was subject to the procedures in Policy 5131. Under Policy 5131, the principal may only recommend assignment to the ALC "for a period in excess of ten school days but not exceeding the time remaining in the school year. . . ." Policy 5131, Art. VI.C.1. Therefore, petitioners' appeal concerns only the assignment of Rone to the ALC for the 2008-09 school year. The fact that petitioners have been offered a superintendent-level hearing for Rone's 2009-10 assignment to the ALC is immaterial to the issues in the instant case. Accordingly, respondent's motion to dismiss petitioners' appeal as moot is denied.

C. Adequate Due Process

[5] Respondent argues, and the trial court concluded as a matter of law, that the failure of respondent to provide petitioners with a superintendent-level hearing was harmless, as petitioners were later provided with an adequate due process hearing by the three-member Board Panel. In making this determination, the superior court relied upon *Goodrich v. Newport News School Bd.*, 743 F.2d 225 (4th Cir. 1984) and *In re Alexander, supra*. In *Goodrich*, the Court held that, for termination of a public school teacher, "[m]inimal procedural due process required . . . adequate notice, a specification of the charges against [the teacher], an opportunity to confront the witnesses against [the teacher], and an opportunity to be heard in [the teacher's] own defense." 743 F.2d at 227 (internal quotations and citation omitted). In *In re Alexander*, this Court held that a long-term suspended student's due process rights were not violated by a hearing where the student was represented by counsel, in addition to presenting and cross-examining witnesses, presenting documentary evidence, and making legal arguments. 171 N.C. App. at 658, 615 S.E.2d at 415. An examination of the hearing procedures and the transcript of the Board Panel hearing indicates that while petitioners' hearing before the Board Panel met some of the due process requirements listed in *Goodrich* and *In re Alexander*, it failed to adequately provide full due process protections.

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Based on the policy's guidelines, the superintendent-level hearing is an evidentiary hearing. *See* Policy 5131, Art. VI.C. The purpose of this hearing is "(i) to determine whether the grounds [for alternative school assignment] are true and substantiated and (ii) if true and substantiated, whether the student's behavior warrants an alternative school assignment . . ." *Id.* At this hearing, the student may be represented by his parent or guardian, or by an attorney of his choice. *Id.* The hearing takes place before a neutral hearing officer, and the principal or his designee has the burden of proving by the greater weight of the evidence that the student has violated the policy. *Id.* Both the principal and the student are permitted to present witnesses and evidence, and both sides are permitted to cross-examine the witnesses presented by the opposing side. *Id.* The student is permitted to appeal the decision of the superintendent-level hearing to the Board, pursuant to Policy 5131, Art. VI.C.7.

In contrast, petitioners' challenge to Rone's assignment to the ALC was a Board-level hearing conducted pursuant to the grievance procedure in Policy 5145. Under this policy, this Board hearing essentially operates as an appellate hearing. The policy requires that "a written record of all prior proceedings shall be prepared by the school attorney that fairly and accurately expresses the facts and contentions of all the parties to the grievance[.]" Policy 5145, Art. IV.C.3. "In addition, each party shall be allowed to prepare a written statement in support of his/her position in respect to the grievance[.]" Policy 5145, Art. IV.C.4. Each side is permitted fifteen minutes to make their primary argument. However, "[n]o new evidence shall be admitted at the hearing" and "the parties shall not be entitled to cross-examine or question any other party to the grievance." Policy 5145, Art. IV.C.5. Finally, after the hearing is concluded, "[t]he hearing panel shall render a decision, in writing, based upon a review of the whole record and the presentations made at the hearing[.]" Policy 5145, Art. IV.C.6.

In the instant case, the Board's decision, which "unanimously affirmed the decision" to assign Rone to the ALC, was made without the benefit of the superintendent-level hearing. A review of the transcript indicates that the Board Panel did not strictly comply with Policy 5145, and permitted petitioners to call a single witness, gave petitioners five minutes of rebuttal time, and allowed petitioners to cross-examine Mills during their rebuttal time.³ However, even though the Board allotted

3. Unlike Policy 5145, a Board-level hearing under Policy 5131, which is a review of the superintendent-level hearing sought by petitioners, would have permitted these procedures in some circumstances.

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more due process measures to petitioners than were required by Policy 5145, these measures were still ultimately inadequate. While petitioners were permitted to present arguments and a single witness on their behalf at the Board hearing, the amount of time the witness testified counted as part of the fifteen minutes allotted for their primary argument. Moreover, while petitioners were allowed to ask some questions of Asst. Principal Mills during their five-minute rebuttal time, their cross-examination was cut off by the Hearing Panel after the expiration of the five-minute period, before the cross-examination was complete. Petitioners' attorney specifically objected to the cessation of his cross-examination. Once the five-minute rebuttal time was complete, petitioners were not permitted to cross-examine any additional administrators or witnesses, or argue in rebuttal. Under these circumstances, respondent violated Rone's due process rights by failing to provide petitioners with an adequate opportunity to present evidence or cross-examine witnesses against Rone. Therefore, we determine that Rone's assignment to the ALC was made upon unlawful procedure, and we reverse the trial court's order affirming the decision of the Board.

C. Remedy

[6] In the instant case, the Petition for Judicial Review specifically sought: (1) a reversal of respondent's assignment of Rone to the ALC; (2) an order for respondent to allow Rone to return immediately to the regular classroom; (3) to expunge Rone's academic record of all references to the assignment to the ALC; and (4) that the costs of the action, including reasonable attorney's fees, be taxed to respondent. At the time this appeal was heard by this Court, Rone had already spent the entire 2008-09 school year in the ALC. Petitioners correctly note that Rone's assignment to the ALC by the Board did not contain a termination date for that assignment. Thus, petitioners contend, Rone has been assigned to the ALC for an indefinite period of time and that this assignment is ongoing.

However, as previously noted, the principal may only recommend assignment to the ALC "for a period in excess of ten school days but not exceeding the time remaining in the school year" Policy 5131, Art. VI.C.1. We have determined, and petitioners themselves have vociferously argued, that Rone was assigned to the ALC as an alternative to suspension and that his assignment therefore fell under Policy 5131. Thus, pursuant to Policy 5131, Rone's assignment to the ALC could necessarily only last until the completion of the 2008-09 school year.

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As a result, our determination that Rone's assignment to the ALC for the 2008-09 school year was made upon unlawful procedure can no longer affect that assignment. Since our review is limited to whether Rone's assignment to the ALC for the 2008-09 school year was valid, our determination that the assignment was invalid does not allow us to grant petitioners' request that Rone be ordered back into the regular classroom immediately, as the school year at issue in the instant case has been completed. Any decision by respondent to assign Rone to the ALC for any time subsequent to the 2008-09 school year would be considered a new assignment under Policy 5131. Such an assignment would once again need to be contested pursuant to the procedure outlined in that policy and then, if necessary, appealed to the superior court, before it could be appealed to this Court.

However, since it is no longer possible to provide Rone with adequate due process to challenge his assignment to the ALC for the 2008-09 school year, we remand the case to the superior court with instructions to further remand the case to the School Board in order to expunge the assignment to the ALC for the 2008-09 school year from Rone's student record. On remand, the superior court should also determine whether petitioners are entitled to the costs of the action.

VI. Conclusion

It is unfortunate that the instant case needed to be resolved by this Court, when cooperation between the parties could have resulted in simpler and less costly resolutions. We do not wish our disposition to preclude schools from being able to adequately protect their faculty, staff, and students from those who may be a threat to themselves or others. We recognize that " 'school districts are in the best position to judge the student's actions in light of all the surrounding circumstances' " and craft a remedy " 'to fit the unique circumstances of each student's situation.' " *King v. Beaufort County Bd. of Educ.*, — N.C. —, —, — S.E.2d —, — (2010) (quoting *In Re RM*, 2004 WY 162, ¶ 25, 102 P.3d 868, 876 (Wyo. 2004)).

However, our review of the instant case is limited to the interpretation and application of respondent's specific policies which were in place at the time of Rone's ALC assignment to the facts which led to the assignment. Because Rone's assignment to the ALC was an alternative to suspension under respondent's policies, petitioners were entitled to a superintendent-level due process hearing as a result of that assignment. Respondent failed to provide petitioners with ade-

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quate due process to support a long-term assignment to the ALC under its procedures which were in place at the time of the assignment.

Rone's assignment to the ALC for the 2008-09 school year was an alternative to suspension under Policy 5118. As a result, petitioners were entitled to the due process superintendent-level hearing set out in Policy 5131. The Board Panel hearing actually provided to petitioners was inadequate to satisfy the requirements of due process. Therefore, the order of the superior court affirming respondent's decision to assign Rone to the ALC is reversed. This disposition makes it unnecessary to consider petitioners' additional assignments of error.

Because the 2008-09 school year is complete, our courts can no longer order respondent to allow Rone to return to the regular classroom for that school year. However, since Rone's assignment to the ALC was made upon unlawful procedure, it should be expunged from his student record. Consequently, we remand the instant case to the superior court for further remand to the Board to expunge Rone's assignment to the ALC for the 2008-09 school year. Additionally, on remand, the superior court should determine whether petitioners are entitled to the costs of the proceedings.

Reversed and remanded.

Judges GEER and STEPHENS concur.

STATE OF NORTH CAROLINA v. DARRELL BOYD, DEFENDANT

No. COA10-25

(Filed 2 November 2010)

1. Search and Seizure— motion to suppress—DNA sample

The trial court did not err by denying defendant's motion to suppress a DNA sample taken from him while he was in custody in Ohio. Defendant's consent was voluntary even though he was unaware that the crimes for which he was being investigated were of a sexual nature. A reasonable person in defendant's position would have believed that the DNA could be used generally for investigative purposes.

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2. Jury— alleged juror misconduct—motion to replace juror denied

The trial court did not err by denying defendant's motion to replace a juror. Nothing suggested that the juror had spoken with other jurors about her thoughts, shared a note addressed to the judge with anyone else, or participated in any kind of misconduct.

3. Sentencing—prior record level—calculation error—new sentencing hearing

The trial court erred in calculating defendant's prior record level and the matter was remanded for a new sentencing hearing. By failing to meet the requirements of N.C.G.S. § 15A-1340.14(f)(1)-(4), the State failed to meet its burden in proving that the convictions listed on defendant's prior record level worksheet existed at the time of sentencing. Further, the prosecutor's in-court statement and accompanying prior record level worksheet were insufficient to prove defendant's prior convictions without a stipulation.

Appeal by defendant from judgment entered 10 August 2009 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 August 2010.

Attorney General Roy Cooper, by Special Deputy Attorney General Gerald K. Robbins, for the State.

Geoffrey W. Hosford for defendant-appellant.

HUNTER, Robert C., Judge.

Darrell Boyd ("defendant") appeals from the trial court's order denying his motion to suppress and further claims that the trial court erred in: (1) denying his motion to replace a juror during trial, and (2) calculating his sentence. After careful review, we affirm the trial court's order denying defendant's motion to suppress and hold that the trial court did not err in denying defendant's motion to replace a juror. Because the trial court erred in calculating defendant's prior record level, we remand for a new sentencing hearing.

Background

On the morning of 1 May 1998, "T.S.", a student at the University of North Carolina at Charlotte ("UNCC"), went to Wal-Mart and returned home at approximately 9:00 a.m. Her roommate left for work shortly thereafter. Suddenly, an African-American man wearing

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a blue bandana that covered his face from the nose down entered her apartment and pointed a gun at her. The intruder forced T.S. into her bedroom, shut the blinds, and told her to shut the blinds in her roommate's bedroom as well. The man then tied her hands to the foot of her roommate's bed and proceeded to search through the apartment. The intruder returned, pointed the gun at T.S.'s head and threatened to kill her. The man asked T.S. if she would be willing to trade her life for sex. She replied, "yes." The intruder had sex with T.S. and then led her to the bathroom and instructed her to take a bath. The assailant then tied T.S. to her bed, and told her to give him a ten-minute head start before she called the police. At the police station several months later, T.S. looked at a picture of defendant and stated that defendant's eyes resembled the eyes of the man who had sex with her; however, she did not otherwise recognize defendant as the man who had attacked her. T.S. stated at trial that she did not know defendant and had never had consensual sex with him.

In May 1998, "J.J." was living in Charlotte and attending UNCC. On 14 May 1998, J.J. worked until about 6:00 p.m., came home, ate dinner, watched television, and went to sleep. When she turned off the light in her bedroom, she saw a man standing in the doorway. The intruder came toward J.J., tackled her, hit her in the face with his fist, and covered her head with bedcovers. The man bound J.J.'s hands with a belt from her bathrobe and had sex with her. The man made J.J. promise on her mother's life that she would not call the police after he left. The assailant then drew a bath for J.J. and told her to wash herself. He then left the apartment. J.J. did not identify defendant in court or by photographic lineup as the man who had sex with her. Like T.S., J.J. testified that she did not know defendant and had never had consensual sex with him.

Lab results showed that the DNA from biological material recovered during the examinations of T.S. and J.J. substantially matched the DNA sample provided by defendant. Defendant testified that he knew T.S. and J.J. and had engaged in consensual sex with both women.

On 25 June 2007, defendant was indicated on two counts of second-degree rape, three counts of second-degree sexual offense, first-degree burglary, one count of common law robbery, and one count of first-degree kidnapping in connection with the assault on J.J. On 9 July 2007, defendant was indicted on one count of felonious breaking and entering, one count of first degree kidnapping, four counts of first degree sexual offense, and four counts of first degree rape in

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connection with the assault on T.S. On 3 August 2009, all of the charges were joined for trial.

Prior to trial, defendant filed a motion to suppress the DNA evidence taken from him while he was incarcerated in Ohio on unrelated charges. Defendant's DNA sample was taken at the request of a Charlotte detective who traveled to Ohio to talk with defendant. Defendant gave the DNA sample after being informed that it could exclude him from certain ongoing investigations. Specifically, defendant was told that the investigation concerned break-ins and assaults on women that occurred in Charlotte in 1998. Defendant acknowledged that he gave the DNA sample voluntarily by signing a document entitled "Consent for Non-testimonial Identification Procedure." Despite signing the consent form, defendant argued that his consent was not voluntarily given. The trial court denied defendant's motion to suppress.

During trial, a note was sent to the judge from juror one. The note requested permission for the jury to see a DVD that was shown by the State on the previous day, and also stated, "[t]he accent Mr. Boyd is using today is fabricated. I speak two other languages and I know the difference in accents. Therefore can we please play the CD that was shown yesterday afternoon?" The court questioned juror one about her ability to continue to listen to the remainder of the evidence before considering defendant's guilt or innocence, and juror one replied that she could. Defendant moved that juror one be replaced with an alternate; the court denied his motion.

At the close of the evidence, the trial court dismissed the common law robbery charge. The jury found defendant guilty of the remaining charges. At sentencing, the State argued that defendant had a prior record level of III. Defense counsel objected to the State's calculation and argued: "[T]he record is inaccurate. I believe the two charges from Ohio arose on the same day. There is one conviction. So his prior level as stated by the State is inaccurate." Defendant also argued that his 10 August 2009 prior record level worksheet contained an additional error. The worksheet included a conviction for "Trafficking Heroin" occurring on "11/8/09." This conviction date would have occurred approximately two months after defendant's sentencing in this case. The prior record level worksheet was the only evidence offered by the State to prove the prior convictions or dates of conviction. Based on the worksheet, the court ruled that defendant's prior record level was III. Defendant was sentenced to a mini-

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num of 336 months and a maximum of 413 months in prison. Defendant timely appealed to this Court.

Discussion

I. Motion To Suppress DNA Evidence

[1] Defendant first argues that the DNA sample taken from him while he was in custody in Ohio should have been suppressed because his consent to take the sample was not voluntary. More specifically, defendant argues that his consent to DNA sampling was obtained by “deceit and misrepresentation.” Defendant claims that the detective who requested the sample never told him that he was under investigation for rape and other sexual assault charges. Defendant argues that the detective’s failure to inform him of all the charges for which he was being investigated amounted to “blatant deception of [defendant in] the key circumstance that led to [his] submission of the saliva sample.” Defendant further claims that this deception prevented his consent from being voluntary, and, accordingly, the State was required to obtain a warrant to take the DNA sample. Defendant argues that because there was no warrant, the DNA sample was an illegal search and seizure under both the United States Constitution and the North Carolina Constitution.

The standard of review for a motion to suppress evidence is whether the trial court’s “findings of fact are supported by competent evidence and whether the findings support the court’s conclusions of law.” *State v. Barkley*, 144 N.C. App. 514, 520, 551 S.E.2d 131, 135-36, *appeal dismissed*, 354 N.C. 221, 554 S.E.2d 646 (2001). “The court’s conclusions of law are fully reviewable on appeal.” *Barkley*, 144 N.C. App. at 520, 551 S.E.2d at 136 (citation and quotation marks omitted).

Here, the trial court concluded as a matter of law that “Defendant freely, knowingly, intelligently, and voluntarily agreed to provide a DNA sample.” Defendant argues that this conclusion of law is erroneous; however defendant does not argue that any of the trial court’s findings of fact were not supported by competent evidence, and, consequently, the findings are binding on appeal. *State v. Carrouthers*, — N.C. App.—, —, 683 S.E.2d 781, 784 (2009).

The taking of genetic material from a person constitutes a search under the North Carolina Constitution and the United States Constitution. *State v. Carter*, 322 N.C. 709, 714, 370 S.E.2d 553, 556 (1988); *Schmerber v. California*, 86 S. Ct. 1826, 1835, 16 L. Ed. 2d 908, 919 (1966). While the genetic material taken was blood in *Carter* and

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Schmerber, we see no distinction between the taking of blood and the taking of saliva for the purpose of DNA testing. “[U]nder our state constitution, a search warrant must be issued before [genetic material] can be obtained,” absent an exception. *Carter*, 322 N.C. at 714, 370 S.E.2d at 556. Consent, when given voluntarily, is an exception to the warrant requirement. *Barkley*, 144 N.C. App. at 520, 551 S.E.2d at 135.

In order for consent to be valid it must be “voluntar[y]. To be voluntary the consent must be . . . ‘freely and intelligently given,’ . . . free from coercion, duress or fraud, and not given merely to avoid resistance.” *State v. Little*, 270 N.C. 234, 239 154 S.E.2d 61, 65 (1967). “When, as here, the State seeks to rely upon defendant’s consent to support the validity of a search, it has the burden of proving that the consent was voluntary.” *State v. Morocco*, 99 N.C. App. 421, 429, 393 S.E.2d 545, 549 (1990). “Voluntariness is a question of fact to be determined from all of the surrounding circumstances.” *Id.* at 429, 393 S.E.2d at 550 (citing *State v. Williams*, 314 N.C. 337, 344, 333 S.E.2d 708, 714 (1985)). In *Florida v. Jimeno*, 111 S. Ct. 1801, 1804, 114 L. Ed. 2d 297, 302 (1991), the Supreme Court stated that “[t]he standard for measuring the scope of a suspect’s consent under the Fourth Amendment is that of ‘objective’ reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?”

Defendant’s claim that his consent was involuntary because the detective failed to tell him that he was being investigated for rape and other sexual assault charges is without merit. The present case is analogous in most respects to *Barkley* where the defendant argued that the trial court erred in denying his motion to suppress DNA evidence obtained by consent. 144 N.C. App. at 518, 551 S.E.2d at 134. The defendant claimed “that [while] he consented to have his blood drawn to exonerate himself in [a] murder investigation . . . the use of his blood to implicate him in [a kidnapping and rape] case violated his constitutional right to be free from unreasonable searches.” *Id.* This Court concluded that “a reasonable person would have understood . . . that his blood analysis could be used generally for investigative purposes, and not exclusively for [one investigation].” *Id.* at 521, 551 S.E.2d at 135. Since the issue was one of first impression, this Court relied on analogous cases from other jurisdictions. *Id.* at 519, 551 S.E.2d at 135. For example, in *Bickley v. State*, 227 Ga. App. 413, 415, 489 S.E.2d 167, 170 (1997), the Georgia appellate court stated that “DNA results are like fingerprints which are maintained on file by law enforcement authorities for use in further investigations.” In

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People v. King, 663 N.Y.S.2d 610, 614-15, 232 A.D.2d 111, 117-18 (1997), the New York appellate court reasoned that

once a person's blood sample has been obtained lawfully, he can no longer assert either privacy claims or unreasonable search and seizure arguments with respect to the use of that sample. Privacy concerns are no longer relevant once the sample has already lawfully been removed from the body, and the scientific analysis of a sample does not involve any further search and seizure of a defendant's person.

The present case is arguably distinguishable from *Barkley* because the defendant in that case argued that "the use of the DNA analysis should have been limited by the *scope of his consent*," and the defendant in the present case argues that the detective's failure to inform him of all the crimes for which he was being investigated prevented his consent from being voluntary. *Barkley*, 144 N.C. App. at 520, 551 S.E.2d at 135 (emphasis added). We find this to be a distinction without a difference. Moreover, the Court in *Barkley* considered whether the defendant's consent was voluntarily given and held that it was voluntary, even though defendant was never informed that the DNA blood evidence might be used in other investigations. *Id.* at 520-21, 551 S.E.2d at 136. The trial court's conclusion of law, "[t]hat the Defendant freely, voluntarily, understandingly, and knowingly consented to having his blood withdrawn for investigative purposes on June the 11th, 1996" is almost identical to the conclusion of law made by the trial court in the present case. *Id.* at 520, 551 S.E.2d at 136. Here, the trial court's undisputed findings of fact establish that:

11. Immediately upon his arrival, Detective Armstrong identified himself as a law-enforcement officer and informed Defendant that he was investigating some break-ins that had occurred in 1998 in Charlotte, North Carolina, during which women had been assaulted.
12. Within five minutes of his arrival, Detective Armstrong had read Defendant his Miranda Rights, explained them to him and had him sign a form indicating he had been informed of his Miranda rights, understood them and was willing to talk with Armstrong and answer his questions.
-
16. Armstrong did not specifically tell Defendant that the assaults were sexual in nature.

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17. Armstrong told Defendant that he needed Defendant's DNA sample to exclude him as a suspect in the break-ins.
18. Defendant consented to providing a DNA sample, signing a written document indicating his assent.
19. Defendant understood that he did not have to assent to giving the DNA sample.
20. Defendant understood that the results of any testing done on the DNA sample could be used against him in court.

We hold that these findings support the trial court's conclusion that defendant's consent was voluntary even though he was unaware that the assaults were of a sexual nature. "Once the [saliva] was lawfully [taken] from defendant's body, he no longer had a possessory interest in that [genetic material]." *Id.* at 520, 551 S.E.2d at 135. We further hold that a reasonable person in defendant's position would believe that the DNA could be used generally for investigative purposes. Consequently, we conclude that the trial court did not err in denying defendant's motion to suppress.

II. Denial of Defendant's Motion to Replace Juror One

[2] Defendant next argues that juror number one should have been excused after she sent a letter to the trial judge requesting to see a DVD that had been played the previous day in court and stated that she thought defendant's accent was fabricated. Defendant argues that the court's decision to deny his motion to dismiss the juror was an abuse of discretion. This argument is without merit.

The challenged juror sent the following letter to the trial judge:

The DA yesterday had a DVD CD with some sort of interview for testimony of Mr. Boyd. Can we play that? The accent Mr. Boyd is using today is fabricated. I speak two other languages and I know the difference in accents. Therefore can we please play the CD that was shown yesterday afternoon?

Defendant argues that the juror's actions constitute misconduct and that the court's failure to replace her deprived defendant of a fair and impartial jury.

A trial court's decision regarding removal of a juror for misconduct "will be reversed only where an abuse of discretion has occurred." *State v. Drake*, 31 N.C. App. 187, 190, 229 S.E.2d 51, 54 (1976) (citing *O'Berry v. Perry*, 266 N.C. 77, 145 S.E.2d 321 (1965)).

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“A trial court’s actions constitute abuse of discretion ‘upon a showing that the actions ‘are manifestly unsupported by reason’ and ‘so arbitrary that they could not have been the result of a reasoned decision.’” *State v. Williams*, 361 N.C. 78, 81, 637 S.E.2d 523, 525 (2006) (quoting *State v. T.D.R.*, 347 N.C. 489, 503, 495 S.E.2d 700, 708 (1998)). Determining whether juror misconduct has occurred “is primarily for the trial court whose decision will be given great weight on appeal.” *State v. Bonney*, 329 N.C. 61, 83, 405 S.E.2d 145, 158 (1991). Deference is given because “[m]isconduct is determined by the facts and circumstances in each case. The trial judge is in a better position to investigate any allegations of misconduct, question the witnesses and observe their demeanor, and make appropriate findings.” *State v. Harris*, 145 N.C. App. 570, 576, 551 S.E.2d 499, 503 (2001). “An inquiry into possible misconduct is generally required only where there are reports indicating that some prejudicial conduct has taken place.” *State v. Murillo*, 349 N.C. 573, 599, 509 S.E.2d 752, 767 (1998). Where there is a mere suspicion of misconduct, any subsequent investigation is within the discretion of the trial court. *Id.* Failure to “investigate and determine the alleged juror misconduct” may constitute error. *Drake*, 31 N.C. App. at 193, 229 S.E.2d at 55.

Here, while the letter sent from the juror questioned the authenticity of defendant’s accent, it said nothing about her opinion concerning his involvement in the alleged rapes. Accordingly, this was not a report that prejudicial conduct had occurred. In fact, reading the note in its entirety supports the possibility that juror one requested the DVD in order to continue weighing defendant’s testimony by comparing what she had heard in court to other statements made by defendant.

Despite only being presented with a note that provided a suspicion of potential misconduct, the court made an inquiry into the note “out of an abundance of caution.” The court questioned the juror in order to determine whether she had “made up [her] mind as to the guilt or innocence [of defendant],” and whether she was “willing to listen to the remainder of the evidence . . . before [she] start[ed] thinking about the guilt or innocence of [defendant].” The juror responded that she had “[n]ot yet” decided on defendant’s guilt or innocence, and could “wait” until she had heard the remainder of the evidence before she considered defendant’s guilt or innocence. The juror did not indicate that she was unable to: accept a “particular defense or penalty” as occurred in *State v. Leonard*, 296 N.C. 58, 62, 248 S.E.2d 853, 855 (1978), or abide by the “presumption of innocence” as seen

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in *State v. Cunningham*, 333 N.C. 744, 754, 429 S.E.2d 718, 723 (1993). In fact, nothing suggested that the juror had spoken with other jurors about her thoughts, shared the note addressed to the judge with anyone else, or participated in any kind of misconduct.

Finally, defendant's argument that the trial court erred because it refused to allow him to examine the juror is without merit. In *Drake*, this Court was faced with a similar situation where the trial court refused to allow defense counsel to examine a juror who was accused of misconduct. 31 N.C. App. at 189, 229 S.E.2d at 53. However, unlike the present case, the trial court in *Drake* also refused to do its own investigation of the allegations despite uncontradicted evidence that jurors had discussed the case with each other before deliberations. The *Drake* Court held that "the denial of the defendant's motion[] . . . to call the juror as a witness, or to otherwise investigate and determine the alleged juror misconduct, was error . . ." *Id.* at 193, 229 S.E.2d at 55. The Court further held that a trial court's investigation of alleged misconduct can be sufficient when "the trial court conduct[s] a careful, thorough investigation, including an examination of the juror involved when warranted and conclude[s] that the conduct ha[s] not prejudiced the jury on any key issue." *Id.* at 191, 229 S.E.2d at 54. In the present case, the trial court properly investigated the allegation of juror misconduct raised by the defendant. The investigation included an examination of the juror, and a conclusion that the alleged conduct had not prejudiced the jury. The law does not support defendant's claim that the trial court committed reversible error when it denied his request to examine the juror. We find no abuse of discretion in the trial court's actions with regard to defendant's motion to replace the juror.

III. Prior Record Level Calculation

A.

[3] Defendant also argues that his prior record level was improperly calculated because it included a conviction that occurred approximately three months after defendant's sentencing in this case. Defendant argues that the inclusion of this conviction in his prior record level calculation entitles him to a new sentencing hearing. We agree.

After defendant was convicted by the jury, the State presented a prior record level worksheet that assigned defendant a prior record level of III. Defendant argues that the State's calculation of his prior record level included a conviction for "Trafficking Heroin," that

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occurred on “11/8/09.” This conviction would have occurred three months after his sentencing in the case at bar on 10 August 2009. Defendant contends that the State’s calculation of his prior record was in violation of N.C. Gen. Stat. § 15A-1340.13(b) (2009) and N.C. Gen. Stat. § 15A-1340.14(f) (2009).

This Court reviews the calculation of a prior record level *de novo*. *State v. Fraley*, 182 N.C. App. 683, 691, 643 S.E.2d 39, 44 (2007). This Court may review a “sentence imposed [that] was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law.” N.C. Gen. Stat. § 15A-1446(d)(18) (2009). This review is appropriate “even though no objection, exception, or motion has been made in the trial division.” N.C. Gen. Stat. § 15A-1446(d). “[T]he court shall determine the prior record level of the offender pursuant to G.S. § 15A-1340.14.” N.C. Gen. Stat. § 15A-1340.13(b). “The prior record level . . . is determined by calculating the sum of the points assigned to each of the offender’s prior convictions” N.C. Gen. Stat. § 15A-1340.14(a). “Under N.C.G.S. § 15A-1340.11(7), a person has a prior conviction if the person has that conviction, . . . on the date a judgment is entered.” *State v. Pritchard*, 186 N.C. App. 128, 130, 649 S.E.2d 917, 919 (2007). “The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction.” N.C. Gen. Stat. § 15A-1340.14(f). Prior convictions must be proved by one of the following methods:

- (1) Stipulation of the parties.
- (2) An original or copy of the court record of the prior conviction.
- (3) A copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts.
- (4) Any other method found by the court to be reliable.

N.C. Gen. Stat. § 15A-1340.14(f)(1)-(4). “A statement by the State asserting that an offender has a certain number of points, corresponding to a specified record level, is not sufficient to meet the requirements of the catchall provision found in N.C. Gen. Stat. § 15A-1340.14, even if the statement is uncontested by the defendant.” *State v. Mack*, 188 N.C. App. 365, 378, 656 S.E.2d 1, 11 (2008). “The State does not satisfy its burden of proving defendant’s prior record level merely by submitting a prior record level worksheet to the trial

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court. “[T]he law requires more than the State’s unverified assertion that a defendant was convicted of the prior crimes listed on a prior record level worksheet.” *State v. Jeffery*, 167 N.C. App. 575, 579, 605 S.E.2d 672, 675 (2004) (internal citations omitted) (quoting *State v. Goodman*, 149 N.C. App. 57, 72, 560 S.E.2d 196, 205 (2002), *rev’d on other grounds per curiam*, 357 N.C. 43, 577 S.E.2d 619 (2003)).

In the present case, defendant’s prior record level calculation was only supported by an in-court statement made by the State, and a prior record level worksheet. No original or copied court records of prior convictions were entered into evidence or submitted to the court. There also were no records submitted from the Division of Criminal Information, the Division of Motor Vehicles, or the Administrative Office of the Courts. The State argues that the information provided to the court should be sufficient under the “[a]ny other method found by the court to be reliable,” clause of N.C. Gen. Stat. 15A-1340.14(f). However, this contention runs contrary to both *Mack*, 188 N.C. App. at 378, 656 S.E.2d at 11, and *Riley*, 159 N.C. App. at 557, 583 S.E.2d at 387 where, like the case at bar, the State only provided a prior record level worksheet to prove the defendant’s prior record level. Accordingly, the State’s evidence was insufficient to meet its burden.

The State’s alternative argument that the prior record level calculation was agreed to by stipulation is equally unpersuasive. The case at bar is quite different from the facts in *Alexander*, where this Court found a stipulation had occurred when “[d]efense counsel [said] . . . ‘up until this particular case [my client] ha[s] no felony convictions, as you can see from his worksheet.’” 359 N.C. at 830, 616 S.E.2d at 918. The Court in *Alexander* found that defense counsel’s statement “indicate[d] not only that defense counsel was cognizant of the contents of the worksheet, but also that he had no objections to it.” *Id.* However, in the present case, defense counsel objected to the prior record level worksheet as a whole, and specifically to the errors assigned by defendant. Defense counsel stated: “We’re not stipulating to the record because the record is inaccurate. . . . I believe that two charges from Ohio arose on the same day. There is one conviction.” Even though defense counsel failed to explicitly object to the inclusion of the trafficking charge at sentencing, “no objection is required to preserve the [sentencing] issue for appellate review.” *Jeffery*, 167 N.C. App. at 579, 605 S.E.2d at 674.

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By failing to meet the requirements of N.C. Gen. Stat. §15A-1340.14(f)(1)-(4), the State failed to meet its burden in proving that the convictions listed on defendant's prior record level worksheet existed at the time of sentencing. Accordingly, defendant is entitled to a new sentencing hearing in order to determine his prior record level.

B.

Finally, defendant argues that his prior record level calculation improperly included points from two felony assault convictions that occurred during the same week of trial in another state. Defendant argues that under N.C. Gen. Stat. § 15A-1340.14(d) only one of the felonies should have been used in the calculation.

Generally, "[t]he prior record level . . . is determined by calculating the sum of the points assigned to each of the offenders prior convictions . . ." N.C. Gen. Stat. § 15A-1340.14(a). "[A] conviction occurring in a jurisdiction other than North Carolina is classified as a Class I felony if the jurisdiction in which the offense occurred classifies the offense as a felony . . ." N.C. Gen. Stat. § 15A-1340.14(e). Per statute, two points are assigned for "each prior felony Class H or I conviction." N.C. Gen. Stat. § 15A-1340.14(b)(4). However, "if an offender is convicted of more than one offense in a single superior court during one calendar week, only the conviction for the offense with the highest point total is used." N.C. Gen. Stat. § 15A-1340.14(d). Prior convictions must be proven according to the methods outlined in N.C. Gen. Stat. § 15A-1340.14(f)(1)-(4).

The State argues that proof of conviction was not necessary in this case because defendant stipulated to the assault convictions while under oath. Inadvertent stipulation to the existence of prior convictions can occur when defense counsel makes statements about the prior record level worksheet. *See State v. Hanton*, 140 N.C. App. 679, 690, 540, S.E.2d 376, 383 (2000) (stating that while defendant may have stipulated to the existence of his prior convictions he did not stipulate to them being substantially similar to corresponding North Carolina felony offenses that carried higher prior record points values). However, the record does not show that defendant or defense counsel made any such stipulation. Defendant admitted on cross-examination that he had been convicted of "two felonies of assault." However, when asked in an immediate follow-up question whether the assault was in 2005, defendant responded: "Yes." Defendant's dating of the assault to 2005 prevents his testimony from stipulating to

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the felony assault dated “04/05/2006.” In fact, defendant’s admission that the assault took place in 2005 is consistent with defense counsel’s argument at sentencing that “the two charges from Ohio arose on the same day.” Additionally, defense counsel stated at sentencing: “We’re not stipulating to the record because the record is inaccurate [H]is prior level as stated by the State is incorrect.” Neither defendant’s or defense counsel’s statements constituted a stipulation.

Without a stipulation, the court was left with the prosecutor’s in-court statement and accompanying prior record level worksheet to prove defendant’s prior convictions. This Court has held that both of those methods, without more, are insufficient to meet the State’s burden. *Jeffery*, 167 N.C. App. at 579, 605 S.E.2d at 675. While the State may have proved the felony assault dated “12/21/2005” through stipulation on the part of the defendant, they failed to meet their burden to prove the existence of the felony assault dated “4/05/2006.” Due to the errors that occurred at the sentencing hearing, we vacate the judgment and remand for a newsentencing hearing.

Conclusion

Because the State failed to prove the existence of defendant’s drug trafficking and felony assault convictions by a preponderance of the evidence we must remand the case for a new sentencing hearing. We find no error in the trial court’s denial of defendant’s motion to suppress and motion to excuse juror number one.

No error in part; remand for resentencing.

Judges CALABRIA and ARNOLD concur.

STATE OF NORTH CAROLINA v. KEISHON KYSHEEN BORDEAUX

No. COA09-1484

(Filed 2 November 2010)

Confessions and Incriminating Statements— motion to suppress— involuntary confession— videotape

The trial court did not err in a robbery case by suppressing defendant’s videotaped confession. A confession obtained as a result of an officer’s promise to testify on behalf of a defendant

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that aroused in defendant a hope of lighter punishment rendered the confession involuntary. Although not determinative of the case, the trial court erred by determining that defendant's *Miranda* rights were violated when defendant voluntarily spoke with a detective after signing a document indicating that he understood his rights.

Appeal by the State from an order entered 30 July 2009 by Judge W. Allen Cobb, Jr., in New Hanover County Superior Court. Heard in the Court of Appeals 29 April 2010.

Attorney General Roy Cooper, by Assistant Attorney General Joan M. Cunningham, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Andrew DeSimone, for Defendant.

BEASLEY, Judge.

The State appeals from a trial court order suppressing Defendant's confession and concluding that the confession was made involuntarily. Because the confession was indeed involuntary, we affirm.

On 12 November 2008, a Hardees restaurant in Wilmington, North Carolina was robbed. During the robbery "each victim was kidnapped, robbed of their personal property . . . and . . . stuffed in a cooler until police arrived." Police officers, arriving in response to the robbery, were able to apprehend suspect Jaquila Banks at the scene. During an interview with police, Banks implicated Defendant and suspect Anthony Prentice, for whom arrest warrants were issued. On 24 November 2008, Defendant, accompanied by his father, voluntarily surrendered to the U.S. Marshall's Service and the Wilmington Police Department, where he was subsequently placed under arrest.

After Detective Lee Odham advised Defendant of his *Miranda* rights, Detectives Odham and Kevin Tully conducted a two-hour videotaped interview with Defendant. During the course of the interview, Defendant confessed to participating in the robbery of the Hardees restaurant on 12 November 2008. On 15 December 2008, Defendant was indicted on two counts of robbery with a dangerous weapon, one count of attempted robbery with a dangerous weapon, and three counts of second-degree kidnaping. On 14 May 2009, Defendant's counsel moved to suppress Defendant's confession made to officers during the two-hour videotaped interview. After reviewing

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the videotape and hearing testimony from the interviewing officers at the suppression hearing, the trial court concluded that “[D]efendant’s confession was coerced and not made freely, voluntarily and understandingly.” Accordingly, the trial court granted Defendant’s motion to suppress. On 19 June 2009, the State filed its written notice of appeal.

In its only argument on appeal, the State contends that “the trial court erred by suppressing Defendant’s videotaped confession because it was knowingly, willingly and voluntarily made.” We disagree.

On appeal from a suppression hearing, this Court will review the trial court’s factual findings to determine if they are supported by competent evidence, “in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge’s ultimate conclusions of law.” *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). The trial court’s conclusions of law are fully reviewable on appeal. *State v. Robinson*, 187 N.C. App. 795, 797, 653 S.E.2d 889, 891-92 (2007).

The Fifth Amendment of the Constitution of the United States proscribes that no one “shall be compelled in any criminal case to be a witness against himself”. U.S. Const. Amend. V. “The self incrimination clause of the Fifth Amendment has been incorporated in the Fourteenth Amendment and applies to states.” *State v. Linney*, 138 N.C. App. 169, 178, 531 S.E.2d 245, 253 (2000). In *Miranda v. Arizona*, the Supreme Court of the United States held that when a criminal suspect is in custody, he or she must be advised of, among other rights, the right to refrain from making self incriminating statements. 384 U.S. 436, 479, 16 L. Ed. 2d. 694, — (1966).

It is well-established that “obtaining confessions involuntarily denies a defendant’s fourteenth amendment due process rights.” *State v. Jones*, 327 N.C. 439, 447, 396 S.E.2d 309, 313 (1990) (citing *Ashcraft v. Tennessee*, 322 U.S. 143, 88 L. Ed. 1192 (1944)). Generally, to be admissible, a defendant’s “confession [must be] the product of an essentially free and unconstrained choice by its maker[.]” *Schneckloth v. Bustamonte*, 412 U.S. 218, 225, 36 L. Ed. 2d 854, 862 (1973). When reviewing a defendant’s confession this court must determine whether the statement was made voluntarily and understandingly. See *State v. Davis*, 305 N.C. 400, 419, 290 S.E.2d 574, 586 (1982) (citation omitted). The voluntariness of a defendant’s confession is based upon the totality of the circumstances. *State v. Greene*, 332 N.C. 565, 579, 422 S.E.2d 730, 738 (1992). Factors considered by courts making this determination include:

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“whether defendant was in custody, whether he was deceived, whether his Miranda rights were honored, whether he was held incommunicado, the length of the interrogation, whether there were physical threats or shows of violence, whether promises were made to obtain the confession, the familiarity of the declarant with the criminal justice system, and the mental condition of the declarant.”

State v. Hyde, 352 N.C. 37, 45, 530 S.E.2d 281, 288 (2000) (quoting *State v. Hardy*, 339 N.C. 207, 222, 451 S.E.2d 600, 608 (1994)) (citation omitted).

On appeal, the State first challenges the trial court’s findings of fact. However, the State never directly contends that the trial court’s findings of fact are not supported by competent evidence or that the officers conducting the interview were misquoted. Instead, the State argues that those findings of fact are not accurately characterized in the trial court’s conclusions of law. Because the State never challenges the competency of the trial court’s factual findings, this argument is waived on appeal. See *Williams v. Insurance Co.*, 288 N.C. 338, 342, 218 S.E.2d 368, 371 (1975) (“[F]indings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary.”); see also *State v. Roberson*, 163 N.C. App. 129, 132, 592 S.E.2d 733, 735-36 (2004) (“Where . . . the trial court’s findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal.”)

The trial court’s factual findings correctly support its legal conclusions. In its suppression order, the trial court found in relevant part:

8. [D]efendant was 18 years of age at the time he was arrested. His date of birth is September 9, 1990.

. . . .

13. The defendant indicated that he was a high school graduate. [Detective Odham] asked if he planned to attend college and he replied that he was planning to attend Cape Fear Community College in January.

14. Detective Odham then stated to the defendant “Well don’t say was [sic], I mean you still got . . . You are not done by no means, if you know what I mean. OK? Anything that happens

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after we leave here today is contingent upon you. OK? I'm not bullsh---- you, you're just a kid. I'm telling you straight up. . . . Everything that happens is contingent upon what happens in this room."

. . . .

18. Detective Odham told the defendant that the other people riding in the car had implicated the defendant in the robbery.

. . . .

21. Detective Odham then tells the defendant that he does not need a statement from the defendant, saying "I don't need to talk to you, man," that his case [was] made and "we will take it to court and see what happens. If you want to help yourself and this did go to Court we could get up in front of the DA or the Judge or both and say, look [at] old boy come in on his own. This is his father. His father is a good guy, you know? He's not a bad kid. He was raised by a good family. He's made a mistake. This is his first and gonna be his only mistake. And the Judge will look at that and say "Well damn, you know, we don't want to ruin this kid's life," or whatever the Judge will say. I don't know what the Judge will say, but when you come in here and have all of this evidence stacked up against you and you deny being there, that is what you call an aggravated offense."

. . . .

23. Detective Odham then tells the defendant that he had spoken to his Dad and "that he told him that he hoped the defendant would try to help himself, and he wanted to come back here with you and I told him, "well let me go talk to him". . . ." You are not a fu---- nut. You are not bouncing off the walls. I told him I would at least come talk to you. Your Dad thought you might want to help yourself, but it is completely up to you, Bro."

. . . .

27. Detective Odham then tells the defendant that based on the time frame that he has admitted to being with the other co-defendant, "You have kinda implicated yourself as being with someone when they did a murder, ok? That's what you've done, not me." He goes on to say that the defendant is not being truthful about the times.

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28. Detective Odham then questioned the defendant about the murder. He says “I’m going to put this out there for you, OK? I told you about all this, the videos, we interviewed Anthony, all that good stuff, uh, this is a pretty tight case, OK as far as people are implicating you and we got video, we’ve got the masks and stuff like that that were dropped by the building, gloves, all kinds of stuff, uh, of course we found her gun and all that good stuff. We’re sending that off for DNA. . . .” “So [I a]m not really concerned with the robbery, OK?” He then says “the most important thing here is to find out who killed that kid. That’s it.” Detective Odham tells defendant that he knows the times when the deceased last used his phone and the time of the murder was when the defendant was with the suspects in the murder. Detective Odham goes on to say “I’m gonna remind you 100% without a doubt I’ve got enough evidence right here to convict you and put you in jail for a long time, OK?” The defendant asks “For murder?” Detective Odham says “I haven’t even started talking about the murder, Keishon.” Then the defendant says “Oh, God.” Then Detective Odham says “I’m going to tell you right now, if you want any assistance, any assistance, any chance to live a normal life when this is over, you better think real hard about what you want to say to me when I come back.”

. . . .

33. Detective Odham tells defendant he is charged with 2 counts of armed robbery, 2 counts of attempted armed robbery, 1 count of felonious breaking and entering, and 3 counts of kidnaping. He tells the defendant “You are not an ass----. If at some point you become an asshole you may get charges [sic] with more stuff.”

. . . .

37. At this point, after about one hour of interrogation, the defendant tells them that he was picked up by the co-defendant. He tells them the female co-defendant gave him a black revolver when he got in the car and details the circumstances of the robbery. He tells them his gun was not loaded. Detective Odham thanks him for being honest. “It goes a long way.”

39. Detective Odham told the defendant “Son, know what you should have done? You should have grabbed her by her fu---- neck and choked the life out of her and beat her to death with

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that gun.” . . . “You could have justified it.” “I’d rather be dead than spend 30 years in prison.”

40. Detective Odham then tells the defendant, “This is the sh-- that is going to help you.”

Based on its findings of fact, the trial court concluded in relevant part:

3. The detective promised the defendant that his truthful admissions of wrongdoing would help him with the Judge.

4. The detective’s promise, together with his threats and attempts to link the defendant with a murder investigation, were sufficient to overcome the defendant’s will.

. . . .

6. The detective’s conduct resulted in a violation of the defendant’s right to remain silent.

7. The detectives made promises, offers of reward and inducements for defendant to make a statement.

8. The defendant’s confession was coerced and not made freely, voluntarily[,], and understandingly.

The trial court’s findings of fact support generally its conclusions of law. However, though not determinative of the case before us for appellate review, we note that the trial court erroneously concluded that the “detective’s conduct resulted in a violation of the [D]efendant’s right to remain silent.”

Shortly before the interview began, Detective Odham advised Defendant of his Miranda rights. Defendant signed a form indicating that he understood his Miranda rights, including the right to remain silent. Immediately thereafter, Detective Odham began to question Defendant. Defendant waived his right to remain silent by voluntarily speaking with Detective Odham after signing a document indicating that he understood his rights. *See State v. Vickers*, 306 N.C. 90, 96-97, 291 S.E.2d 599, 604 (1982), *overruled on other grounds by State v. Barnes*, 333 N.C. 666, 430 S.E.2d 223 (1993). Moreover, Defendant’s silence or refusal to answer any of the detectives’ questions could not be construed as an invocation of his right to remain silent. *See Berghuis v. Thompkins*, — U.S. —, 176 L. Ed. 2d 1098 (2010).

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In *Berghuis*, the defendant was arrested and interrogated in relation to a number of charges arising from a violent shooting incident. The interviewing officers informed the defendant of his *Miranda* rights before the interrogation commenced. Thereafter, a three hour interrogation ensued, during which defendant “[l]argely [remained] silent”, on occasion giving limited responses such as “yeah”, “no” or “I don’t know.” *Id.* at —, 176 L. Ed. 2d. at 1107. Approximately two hours forty-five minutes into the interrogation, a detective asked the defendant “Do you believe in God?” the defendant responded “Yes as his eyes ‘well[ed] up with tears.’” The detective next asked the defendant if he prayed to God to which defendant replied “Yes.” The detective then asked, “Do you pray to God to forgive you for shooting that boy down?” to which defendant responded “Yes” and “looked away.” *Id.* The defendant moved to suppress his confession arguing that by remaining silent for two hours forty-five minutes, he had invoked his right to remain silent. The trial court denied the defendant’s motion to dismiss and the defendant appealed.

On review, the United States Supreme Court held that if a defendant wishes to invoke the right to remain silent, he must unambiguously express that desire. *Id.* —, 176 L. Ed. 2d. at 1111. Merely remaining silent does not affirmatively invoke the protection against self incrimination garnered by the Constitution. *Id.* The defendant never indicated that he wished to remain silent nor did he request an attorney. There was no indication that questioning in *Berghuis* involved trickery, deceit, or coercion or promises of a positive end. *Id.* On the issue of whether the defendant waived his right to remain silent, the court noted that “[t]he waiver inquiry ‘has two distinct dimensions:’ waiver must be ‘voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception,’ and ‘made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.’” *Id.* (quoting *Moran v. Burbine*, 475 U.S. 412, 421, 89 L. Ed. 2d. 410, (1986)). In the case *sub judice*, Defendant voluntarily went to the police station, and prior to questioning by Detectives Odham and Tully, signed a waiver, and spoke to the detectives. Accordingly, a careful review of the record reveals that the trial court erroneously determined that Defendant’s *Miranda* rights were violated.

Despite complying with the basic requirements of *Miranda*,

the ultimate test of the admissibility of a confession still remains whether the statement made by the accused was in fact voluntar-

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ily and understandingly made. The fact that the technical procedural requirements of *Miranda* are demonstrated by the prosecution does not . . . control the question of whether a confession was voluntarily and understandingly made.

State v. Pruitt, 286 N.C. 442, 454, 212 S.E.2d 92, 100 (1975) (internal citations omitted). Once the procedural requirements of *Miranda* have been met, courts must examine the totality of the circumstances to determine whether a defendant's confession was voluntarily and understandingly made. See *State v. Corley*, 310 N.C. 40, 47 311 S.E.2d 540, 545 (1984).

Though Defendant received his *Miranda* warnings, the trial court appropriately determined that Defendant's confession was involuntary. The trial court concluded that Defendant's confession was rendered involuntary due to attempts to improperly link Defendant to an ongoing murder investigation and promises made by the interviewing detectives. To support its legal conclusions, the trial court found that during Defendant's custodial interrogation, detectives represented that if Defendant provided them with a confession, they would speak to the judge or the district attorney requesting leniency for Defendant. Detectives suggested that Defendant may still have the opportunity to attend community college and that if he wanted "any chance to live a normal life," he should be cooperative. Moreover, the officers questioned Defendant about a murder investigation in which Banks was a suspect. Detective Odham told Defendant that he had implicated himself "as being with someone when they did a murder." During the suppression hearing, the trial court correctly concluded that questions regarding the murder investigation were intended to coerce Defendant's confession and were "sufficient to overcome the defendant's will." The interviewing techniques utilized by officers in this case rendered Defendant's confession involuntary.

Our Supreme Court has held that if a confession is obtained as a result of an officer's promise to testify on behalf of a defendant, and the promise arouses in the defendant "a hope for lighter punishment," the confession is inadmissible at trial. *State v. Fuqua*, 269 N.C. 223, 228, 152 S.E.2d 68, 72 (1967). In *Fuqua*, a police officer told a defendant in custody that "if he wanted to talk to me then I would be able to testify that he talked to me and was cooperative." *Id.* (internal quotation marks omitted). The Supreme Court determined that "[t]his statement by a person in authority was a promise which gave defendant a hope for lighter punishment. It was made by the officer before

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the defendant made his confession, and the officer's statement was one from which defendant could gather some hope of benefit by confessing." *Id.* Thereafter, the trial court determined that, based on a totality of the circumstances, the defendant's confession was made involuntarily. *Id.*

Citing a number of supportive cases, the State argues that "[a] suggestion of hope created by statements of law enforcement officers that they will talk to the District Attorney regarding a suspect's cooperation where there is no indication that preferential treatment might be given in exchange for cooperation does not render inculpatory statements involuntary." *State v. Houston*, 169 N.C. App. 367, 375, 610 S.E.2d 777, 783 (2005); *State v. McKinney*, 153 N.C. App. 369, 375, 570 S.E.2d 238, 243 (2002) (holding that "[a]ny inducement of hope must promise relief from the criminal charge to which the confession relates.") (internal quotation marks omitted). While the State's contention is a correct statement of the law, the cases cited by the State are distinguishable.¹

The trial court found that during the interview, officers indicated to Defendant that they would testify on his behalf and explain that he only made a mistake. Thereafter, Detective Odham explained that "the Judge will look at that and say 'Well damn, you know, we don't want to ruin this kid's life, or whatever the Judge will say. I don't know what the Judge will say . . .'" While Detective Odham attempted to retreat from his initial statement by explaining that he could not pre-

1. The State also cites *State v. Shelly*, 181 N.C. App. 196, 204, 638 S.E.2d 516, 522 (2007) (holding that no improper promises were made where an interrogating officer told a defendant that "I can tell you that a person who cooperates and shows remorse and is honest and has no criminal background when it goes to court, has the best chance of getting the most leniency because he cooperated[,]") (internal quotation marks omitted); *State v. Gainey*, 355 N.C. 73, 84, 558 S.E.2d 463, 471 (2002) (holding that trial court appropriately found that no promises or offers of reward were made where a defendant was told that "[if] he wanted to help himself that he could help himself by cooperating" (internal quotation marks omitted)); *State v. Bailey*, 145 N.C. App. 13, 19, 548 S.E.2d 814, 818 (2001) (holding that a defendant's confession did not arise from improper inducement where officers told him that if he provided a truthful statement "everything would probably have a little less consequence to it" and "things would probably go easier" (internal quotation marks omitted)); *State v. Smith*, 328 N.C. 99, 115, 400 S.E.2d 712, 720-21 (1991) (holding that confession was not induced from an improper promise where competent evidence supports the trial court's finding that the interviewing officer made no promises during the interrogation); *State v. Hardy*, 339 N.C. 207, 224, 451 S.E.2d 600, 609 (1994) (holding that implicit threats or promises did not render a defendant's statement involuntary when a review of the circumstances reveals that the defendant's "independent will was not overcome, so as to induce a confession that he was not otherwise disposed to make. . . ." (internal quotation marks omitted)).

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dict what the Judge would say in light of the proposed testimony, other statements made throughout the course of the interview helped to arouse in Defendant the hope of a more lenient sentence. Several statements made by Detective Odham suggested that Defendant might still have the opportunity to attend community college and that his future was dependant upon cooperating during the interview. The trial court's findings indicate that the detectives promised that they would speak on Defendant's behalf and a benefit would result. When viewed in their totality, the Detectives' statements during the course of the interview aroused in Defendant "an 'emotion of hope'" of lighter, more lenient sentence. *Fuqua*, 269 N.C. at 228, 152 S.E.2d at 72.

The involuntariness of Defendant's statement is not limited to promises made by the interviewing officers. Typically, deceptive interrogation practices and trickery are insufficient to support a finding that a confession was made involuntarily and trial courts must examine the totality of the circumstances to determine the admissibility of the confession. *See State v. Jackson*, 308 N.C. 549, 574, 304 S.E.2d 134, 148 (1983) ("The general rule . . . is that while deceptive methods or false statements by police officers are not commendable practices, standing alone they do not render a confession of guilt inadmissible. The admissibility of the confession must be decided by viewing the totality of the circumstances[.]"). Impermissible deceptive tactics can include false information regarding "the nature of the crime involved or possible punishment." *State v. Barnes*, 154 N.C. App. 111, 115, 572 S.E.2d 165, 168 (2002).

In *Barnes*, law enforcement officers, investigating a defendant father for alleged sex offenses committed against his daughter, intentionally misinformed the defendant that his daughter was pregnant. *Id.* at 113, 572 S.E.2d at 167. After determining that "[t]he use of false statements and trickery by police officers during interrogations is not illegal as a matter of law[,]" our Court turned to other factors to determine the admissibility of the defendant's statement. *Id.* at 114, 572 S.E.2d at 167. Our Court found that: (1) the interrogation tactics employed "did not implant fear of physical violence or hope of better treatment;" (2) the defendant "was not tricked about the nature of the crime involved or possible punishment;" (3) the officer "did not subject defendant to threats of harm, rewards for confession, or deprivation of freedom of action;" (4) "[t]he evidence in the record does not show an oppressive environment[;]" and (5) "defendant's intoxication at the time of confession does not preclude a conclusion that a defendant's statements were freely made[.] . . . [and the] record

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does not show defendant was so heavily under the influence that he could not understand the implications of confessing to sexually assaulting his daughter.” *Id.* at 115-16, 572 S.E.2d at 168-69 (internal citations omitted). After an examination of the circumstances our Court held the defendant’s statement to law enforcement officers was made voluntarily. *Id.* at 116, 572 S.E.2d at 169.

In this case, the detectives’ suggestion that Defendant was a suspect in a murder investigation accompanied by promises of relief made Defendant’s statement involuntary. The officers were fully aware that Defendant did not participate in the murder. The intended effect of the detectives’ query about the murder was to cause Defendant to be “worried and off balance.” When coupled with the promises of relief, the deception used by detectives rendered Defendant’s confession inadmissible at trial.

While it is crucial that the ability of investigators to procure voluntary confessions is not undermined, restraints on law enforcement officers are necessary to prevent the admission of coerced statements at trial. *See id.* at 115, 572 S.E.2d at 168. Recognizing the importance of this balance our General Assembly has provided that:

Upon timely motion, evidence must be suppressed if: (1) Its exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina; or

(2) It is obtained as a result of a substantial violation of the provisions of this Chapter. In determining whether a violation is substantial, the court must consider all the circumstances, including:

- a. The importance of the particular interest violated;
- b. The extent of the deviation from lawful conduct;
- c. The extent to which the violation was willful;
- d. The extent to which exclusion will tend to deter future violations of this Chapter.

N.C. Gen. Stat. § 15A-974 (2009). A review of the circumstances surrounding this action reveals that the detectives tricked and deceived Defendant about the nature of the crime for which he was investigated; the detectives’ tactics were intended, and did in fact implant fear of prosecution for a more serious offense of murder and also induce hope of leniency. Defendant was promised that if he confessed, he may be able to continue his plans to attend community college.

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Additionally, unlike in *Barnes*, Defendant was in custody at the time of his interrogation. *Barnes*, 154 N.C. App. at 117, 572 S.E.2d at 170. Because the interrogation tactics utilized by detectives rendered Defendant's statement involuntary, the trial court appropriately determined that Defendant's statement was inadmissible. Accordingly, we affirm.

Affirmed.

Judge ELMORE concurs.

Judge BRYANT concurs with separate opinion.

BRYANT, Judge.

I concur in the result reached by the majority. I believe the facts of this case could support a trial court's finding and conclusion that defendant's confession was voluntary and not coerced. However, given that the initial determination of whether the State has met its burden of showing defendant's confession to be voluntary is for the trial court², and acknowledging the lower court's proximity to the parties as well as the issue now before us on appeal, I must concur in the result.

2. In *State v. Corley*, our Supreme Court stated:

In a *voir dire* hearing on the admissibility of a defendant's confession, the trial court must determine whether the State has borne its burden of showing by a preponderance of the evidence that the defendant's confession was voluntary. *State v. Johnson*, 304 N.C. 680, 285 S.E.2d 792 (1982). The preponderance of the evidence test is not, however, to be applied by appellate courts in reviewing the findings of the trial court. *Id.* The findings by the trial court are conclusive and binding upon appellate courts if supported by competent evidence in the record. *Id.* This is true even though the evidence is conflicting. *State v. Jackson*, 308 N.C. 549, 304 S.E.2d 134 (1983).

310 N.C. 40, 52, 311 S.E.2d 540, 547 (1984). Moreover, "[c]onclusions of law that are correct in light of the findings are also binding on appeal." *State v. Howell*, 343 N.C. 229, 239, 470 S.E.2d 38, 43 (1996) (citing *State v. Mahaley*, 332 N.C. 583, 593, 423 S.E.2d 58, 64 (1992)).

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[207 N.C. App. 658 (2010)]

STATE OF NORTH CAROLINA v. LONNIE GENE YONCE

No. COA09-1504

(Filed 2 November 2010)

1. Appeal and Error— lack of jurisdiction—untimely appeal

The Court of Appeals did not have jurisdiction to review defendant's challenge to the revocation of his probation in the trial court's 27 October 2008 order based on defendant's failure to make a timely appeal.

2. Probation and Parole— probation violation—failure to pay restitution

Although defendant timely appealed from the 8 December 2008 order, defendant failed to show the trial court abused its discretion by committing defendant to the custody of the Department of Correction at the conclusion of the hearing. Defendant had already been found in willful violation of the conditions of his probation and had been given a one month reprieve to make the required restitution payments. The record was devoid of any evidence explaining any specific reason that defendant was unable to make the required payments.

3. Appeal and Error— motion for appropriate relief denied— effective assistance of counsel

Defendant's motion for appropriate relief asserting that his trial counsel failed to provide him with constitutionally effective representation was denied. Defendant failed to demonstrate that the documentation upon which he now relied could have been produced at either hearing.

Appeal by defendant from judgments entered 8 December 2008 by Judge V. Bradford Long in Randolph County Superior Court. Heard in the Court of Appeals 26 May 2010.

Attorney General Roy Cooper, by Assistant Attorney General Gregory P. Roney, for the State.

Law Office of Bruce T. Cunningham, by Bruce T. Cunningham, Jr. and Heather L. Rattelade, for defendant.

ERVIN, Judge.

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Defendant Lonnie Gene Yonce appeals from judgments entered by the trial court imprisoning him for a total of a minimum of 105 months and a maximum of 126 months in the custody of the North Carolina Department of Correction as the result of a prior determination that he had willfully failed to comply with the terms and conditions of certain probationary judgments. After careful consideration of Defendant's challenges to the trial court's order in light of the record and the applicable law, we conclude that Defendant had not challenged the revocation of his probation in a timely manner, that the trial court's order committing him to the custody of the Department of Correction should be affirmed, and that his motion for appropriate relief on appeal should be denied.

I. Factual Background

On 29 November 2007, Defendant pled guilty to seven counts of obtaining property by false pretenses. Based upon his guilty pleas, the trial court entered judgments sentencing Defendant to seven consecutive sentences of a minimum of 15 months and a maximum of 18 months imprisonment in the custody of the North Carolina Department of Correction. However, the trial court suspended the active sentences imposed upon Defendant and placed him on supervised probation for a period of five years on the condition, among other things, that Defendant pay restitution in the amount of \$57,100.00.

On 9 May 2008, Probation Officer Kurt Teague filed violation notices alleging, in each case, that Defendant had willfully failed to comply with the terms and conditions of his probation by not making the required restitution payments in a timely manner. On 27 October 2008, a violation hearing was conducted before Judge W. Douglas Albright, at which Defendant conceded that he had failed to make the required restitution payments in accordance with the schedule established by his probation officer but denied that he had acted willfully. As of the date of the hearing, Defendant had paid \$2,739.00 and owed an arrearage of \$7,733.00. In the course of the violation hearing, Defendant testified that he received a \$1,200.00 monthly disability payment from the Department of Veterans Affairs, an amount which exceeded his monthly restitution payment of \$952.00, and that the majority of his monthly disability benefit payment was used to provide support for his nineteen-year old daughter and one-year old grandson. Defendant stated that he thought that he could become current on his payments because he had applied for additional bene-

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fits from the Veteran's Administration and the Social Security Administration and that, once his application was approved, he would receive a \$20,000.00 retroactive benefit payment.

At the conclusion of the 27 October 2008 hearing, Judge Albright found that Defendant had willfully violated the restitution condition of his probation judgments. More particularly, the trial court found "as a fact that [Defendant] ha[d] willfully and without any lawful excuse whatsoever" violated the terms and conditions of his probation. However, based upon Defendant's promise to "have all arrears brought current" upon receipt of the retroactive disability benefit payment, Judge Albright gave the Defendant until 1 December 2008 to come into compliance, stayed the execution of his order until 8 December 2008, and scheduled a review hearing for the latter date. In addition, Judge Albright found that, if Defendant fully complied with the monetary payment provisions of the original judgments by 1 December 2008, his active sentences should not be put into effect. On the other hand, if Defendant failed to "be in full and complete compliance" on 8 December 2008, his prison sentences should be activated immediately.

On 8 December 2008, Defendant appeared before the trial court for a status hearing. After Defendant reported that he had only paid \$160.00 towards the \$8,520.00 needed to bring himself into compliance with the financial provisions of the original probationary judgments, the trial court made following findings of fact:

[First.] The defendant was placed on supervised probation by the Presiding Judge . . . pursuant to a transcript [of] plea, which transcript of plea required that the defendant pay restitution in this matter.

Second. The transcript of plea required that in each of the matters set out above the defendant's sentences shall run consecutive to one another if the defendant was revoked from supervised probation.

Third. The defendant was cited for a probation violation report on May the 9th, 2008. That a probation violation hearing was held on [October] the 27th, 2008 in Randolph County Criminal Superior Court before the Honorable W. Douglas Albright, emergency Superior Court Judge presiding.

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[Fourth.] That Judge Albright found the defendant in willful violation of his conditions of probation[] and ordered that the defendant's probation be revoked.

[Fifth.] The Court issued a stay of execution on commitments of the defendant until December the 8th, 2008.

[Sixth.] The Court ordered that—The Court recommended that if the defendant was in full compliance with all conditions and moneys that his sentence not be invoked on December the 8th.

[Seventh.] The Court further ordered that the commitments in this matter shall issue forthwith if the defendant is not in full compliance.

[Eighth.] This Court does not have before it a transcript of [the] October the 27th, 2008 hearing before Judge Albright, but the Court finds that based upon the judgment and other dispositions entered that date that the Court finds that Judge Albright entered the appropriate findings and conclusions on the record on October the 27th, 2008. The Court further finds that while this Court is not bound by the judgment entered on October 27th 2008 to commit the defendant, that as the defendant has been revoked from probation pursuant to the Order of October 27th, 2008, and that as the defendant has failed—that since October 27th, 2008 through today's date, the defendant has paid \$160.00 on his—on the monies owed under the terms of his probation as opposed to the 8,000—approximately \$8,500.00—which the October 27th, 2008 Order presented would be paid by today's date.

Based upon these findings, the trial court “conclude[d] that the interest of justice requires that the commitments be issued” and ordered that Defendant begin serving his active sentences. Defendant noted an appeal to this Court from the trial court's order.

II. Legal Analysis

A. 27 October 2008 Order

[1] On appeal, Defendant contends that Judge Albright and the trial court failed to make adequate findings of fact to support their conclusion that his probation should be revoked and his suspended sentences activated and that the effect of the orders entered by Judge Albright and the trial court was to violate the prohibition against imprisoning an individual based solely on his or her inability to pay. Although Defendant's appellate arguments allude to the 8 December

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2008 order, they are primarily focused on the 27 October 2008 order. The State, however, contends that we lack the authority to consider Defendant's challenge to Judge Albright's order of 27 October 2008. A careful review of the record establishes that the State's contention has merit.

At the conclusion of the 27 October 2008 hearing, Judge Albright found "that [Defendant] ha[d] willfully and without any lawful excuse whatsoever violated the terms and conditions of his probation as alleged in the various violation reports." In addition, Judge Albright "order[ed] that [Defendant's] probation be . . . revoked and the sentences [] ordered into effect." The literal language of Judge Albright's order clearly establishes that Defendant's probation had been revoked and his sentences activated at that point in the proceedings.

"After a conviction or plea (guilty or *nolo contendere*), the court has power: (1) [t]o pronounce judgment and place it into immediate execution; (2) to pronounce judgment and suspend or stay its execution; (3) to continue prayer for judgment." *State v. Griffin*, 246 N.C. 680, 682, 100 S.E.2d 49, 50-51 (1957); *see also State v. Thompson*, 267 N.C. 653, 655, 148 S.E.2d 613, 615 (1966); *State v. Brown*, 110 N.C. App. 658, 659, 430 S.E.2d 433, 434 (1993); *Florence v. Hiatt*, 101 N.C. App. 539, 541, 400 S.E.2d 118, 120 (1991). "[W]hen the judgment is pronounced and its execution is stayed or suspended, 'such disposition of the cause does not serve to delay or defeat the defendant's right of appeal.'" *Griffin*, 246 N.C. at 681, 100 S.E.2d at 51 (citing *State v. Miller*, 225 N.C. 213, 215, 34 S.E.2d 143, 145 (1945) (stating that "the order suspending the imposition or execution of sentence on condition is favorable to the defendant in that it postpones punishment and gives him an opportunity to escape it altogether," so that, "[w]hen he sits by as the order is entered and does not then appeal, he impliedly consents and thereby waives or abandons his right to appeal on the principal issue of his guilt or innocence and commits himself to abide by the stipulated conditions"); (citing *State v. Calcutt*, 219 N.C. 545, 15 S.E.2d 9 (1941) (citations omitted)). Although these principles have been established in cases involving the pronouncement of judgment following a determination of guilt rather than in the context of a determination that a defendant has violated the terms and conditions of his or her probation, we see no reason based on our examination of the applicable statutory provisions and other relevant legal materials to reach any conclusion other than that the same basic principles apply to instances in which a trial judge determines that a defendant has violated the terms and conditions of his or her proba-

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tion. As a result, in the event that a trial judge determines that a defendant has willfully violated the terms and conditions of his or her probation, activates that defendant's suspended sentence, and then stays execution of his or her order, a final judgment has been entered, triggering the defendant's right to seek appellate review of the trial court's decision.

N.C.R. App. P. 4(a)(2) requires that an appeal in a criminal case be noted within fourteen days after the entry of judgment. Judgment is entered "when sentence is pronounced." N.C. Gen. Stat. § 15A-101. Judge Albright entered a final judgment when he ordered that Defendant's "sentences [be put] into effect" on 27 October 2008. Although Defendant, without citing any authority in support of his position, appears to contend to the contrary, Judge Albright's decision to defer actually committing Defendant to the custody of the Department of Correction for the purpose of beginning the service of his active sentences did not operate to defer the entry of judgment. For that reason, the fourteen day period specified in N.C.R. App. P. 4(a)(2) began running at the time that Judge Albright entered the 27 October 2008 order. Since Defendant did not note his appeal to this Court until 12 December 2008, a date substantially more than fourteen days following the entry of Judge Albright's order, this Court lacks jurisdiction over Defendant's challenge to the revocation of his probation as embodied in Judge Albright's order and has no authority to consider Defendant's challenge to that decision. *State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320 (2005), *appeal dismissed*, 360 N.C. 73, 622 S.E.2d 626 (2006) (noting that, "when a defendant has not properly given notice of appeal, this Court is without jurisdiction to hear the appeal"). As a result of Defendant's failure to note his appeal in a timely manner, we lack the authority to entertain Defendant's challenge to Judge Albright's 27 October 2008 order on the merits and decline to do so.

B. 8 December 2008 Order

[2] Defendant did, however, note his appeal from the 8 December 2008 order in a timely manner, so that we have jurisdiction over his challenge to that order. We do not, however, believe that Defendant has shown any error of law in the trial court's decision to commit him to the custody of the Department of Correction at the conclusion of the 8 December 2008 hearing.

As we have already noted, a trial judge has the inherent power to stay the execution of a judgment. *Griffin*, 246 N.C. at 682, 100 S.E.2d

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at 50-51. Thus, the only issue before the trial court at the 8 December 2008 hearing was whether it should continue to stay the activation of Defendant's suspended sentences or to commit Defendant to the custody of the Department of Correction. The extent to which Judge Albright properly revoked Defendant's probation at the 27 October 2008 hearing was not at issue before the trial court on 8 December 2008. Although the parties have not cited any authority addressing the standard of review that should be applied in evaluating appellate challenges to decisions of the nature actually made by the trial court and although we have not found any such authority in the course of our own research, we believe, by analogy to the standard utilized in determining whether a trial judge erred in revoking a defendant's probation and activating his or her suspended sentences, *State v. Guffey*, 253 N.C. 43, 45, 116 S.E.2d 148, 150 (1960) (stating that "[t]he findings of the judge, if supported by competent evidence, and his judgment based thereon are not reviewable on appeal, unless there is a manifest abuse of discretion") (citations omitted), that the trial court's decision to refrain from further staying the execution of Judge Albright's order is reviewable under an abuse of discretion standard. *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (stating that "[a] trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason" or in the event "that it was so arbitrary that it could not have been the result of a reasoned decision") (citing *Clark v. Clark*, 301 N.C. 123, 128-29, 271 S.E.2d 58, 63 (1980)).

At the 8 December 2008 hearing, the following colloquy occurred concerning the trial court's responsibilities under the 27 October 2008 order:

THE COURT: . . . The Order reads as follows: 'Defendant denies willfulness of violation. The Court finds the defendant is in willful violation of his conditions of probation. The defendant's probation is revoked. The Court issues a stay of execution on that commitment until December the 8th, 2008. The defendant states to the Court that in no uncertain terms he will have all monies paid and current by December 1, 2008. . . . Under no circumstances shall this judgment be altered if the defendant is not in full compliance by the date given. . . .'

. . . All right. Judge Albright said that you need to have all your money paid today. All right. [Defense Counsel], tell me what [we've] got here.

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[DEF. COUN.]: Your Honor, he needed to pay \$8,520.00 by today. And how much has he brought? . . .

THE COURT: He says \$160.00.

[PROB. OFF.]: He's paid 160 as of today's date.

[DEF. COUN.]: If your Honor, please?

THE COURT: Yes, sir?

[DEF. COUN.]: He approximately \$200.00 today. [sic] He is hoping to get his disability check any day. He was waiting for his disability check because that's what the continuance was for until today so that he could receive and he could get his disability check.

In addition, Defendant attempted to explain his non-compliance as follows:

[DEF. COUN.]: Mr. Yonce, do you agree that you agreed to pay the sum of more than \$8,000.00 by today's date?

[DEFENDANT]: I did not.

[DEF. COUN.]: You did not say that sum?

[DEFENDANT]: I said that if I got my entitlement money that's coming, that I would catch it up by today's date. And I paid some December the 1st, what I could, like I've always done. And I paid some December the 1st, and I tried to pay what I could, and I'm trying to do what this court told me to do[,] to the best that I can.

Thus, the record of the proceedings leading to the entry of the 8 December 2008 order clearly reflects that Defendant admitted having failed to comply with the condition set out in Judge Albright's order, which required him to become current by 1 December 2008, and that he attempted to offer what he hoped would be a satisfactory explanation for his failure to have become current by that point. Although Defendant argued before the trial court and argues on appeal that the trial court should not have terminated the stay of Judge Albright's order or committed him to the custody of the Department of Correction to serve his suspended sentences because he had not received the retroactive disability benefit payment that he intended to utilize to make the required payment as the result of "slow processing," the trial court did not accede to that request and we are unable to conclude that its decision to that effect "could not have been the result of a reasoned decision." *White*, 312 N.C. at 778, 324 S.E.2d at 833.

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As a general proposition, “[a]ll that is required to revoke probation is evidence satisfying the trial court in its discretion that the defendant violated a valid condition of probation without lawful excuse.” *State v. Tozzi*, 84 N.C. App. 517, 521, 353 S.E.2d 250, 253 (1987). On the other hand, “fairness dictates that in some instances a defendant’s probation should not be revoked because of circumstances beyond his control.” *State v. Hill*, 132 N.C. App. 209, 212, 510 S.E.2d 413, 415 (1999). “In a probation revocation proceeding based upon a defendant’s failure to pay a fine or restitution which was a condition of his probation the burden is upon the defendant to ‘offer evidence of his inability to pay money according to the terms of the [probationary] judgment.’” *State v. Jones*, 78 N.C. App. 507, 509, 337 S.E.2d 195, 197 (1985) (quoting *State v. Williamson*, 61 N.C. App. 531, 534, 301 S.E.2d 423, 426 (1983)).

If, upon a proceeding to revoke probation or a suspended sentence, a defendant wishes to rely upon his inability to make payments as required by its terms, he should offer evidence of his inability for consideration by the judge. Otherwise, evidence establishing that defendant has failed to make payments as required by the judgment may justify a finding by the judge that defendant’s failure to comply was willful or was without lawful excuse.

State v. Young, 21 N.C. App. 316, 320-21, 204 S.E.2d 185, 187 (1974). Although Defendant’s probation had already been revoked, so that the standard set out in *Tozzi*, *Hill*, *Jones*, and *Young* is not directly relevant to the exact issue properly before us on appeal, Defendant’s failure to satisfy this standard during the proceeding held before the trial court on 8 December 2008 would clearly establish that the trial court did not act arbitrarily in declining to continue to stay enforcement of Judge Albright’s order.

The record does not reflect that the opportunity that Defendant was given to be heard at the 8 December 2008 hearing was in any way inadequate. As a general proposition, a proceeding such as the one at issue here, like a revocation hearing, is an informal one in which the trial court is “not bound by strict rules of evidence[.]” *State v. Hewett*, 270 N.C. 348, 353, 154 S.E.2d 476, 480 (1967) (citations omitted). Perhaps for that reason, Defendant has not challenged the lawfulness of any aspect of the manner in which the trial court conducted the 8 December 2008 hearing except for his contention that it failed to make adequate findings concerning the basis for the determination

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that Defendant had willfully violated the terms and conditions of his probation, an issue which was not properly before the trial court in light of the fact that Judge Albright had already decided that Defendant's probation should be revoked. At the 8 December 2008 hearing, Defendant explained his failure to become current on his payments on the grounds that he had told Judge Albright that he would make the required payment "if I got my entitlement money" and that he had "tried to pay what I could." However, these statements, which were made at a time when Defendant had already been found to be in willful violation of the conditions of his probation and after Defendant had been given a one month reprieve from his commitment to the custody of the Department of Correction, do not adequately demonstrate an inability to make the required payments. For example, the record developed before the trial court on 8 December 2008 is completely devoid of any evidence describing Defendant's expenses or explaining any specific reason that Defendant was, in fact, unable to make the required payments. Similar statements have been held insufficient to prevent the revocation of a defendant's probation for non-payment. *Jones*, 78 N.C. App. at 509-10, 337 S.E.2d at 197 (finding that the defendant's unsworn statement that "I've just been out of work, sir," did not suffice to preclude revocation of that defendant's probation). Furthermore, even if a defendant presents evidence tending to show that he unavoidably lacked the means to make the required payments, "[t]he trial judge, as the finder of the facts, is not required to accept defendant's evidence as true." *Young*, 21 N.C. App. at 321, 204 S.E.2d at 188. Therefore, since the trial court would have been justified in revoking Defendant's probation on the basis of the information available to him at the 8 December 2008 hearing, we cannot conclude that the trial court abused its discretion in deciding to commit Defendant to the custody of the Department of Correction based on Judge Albright's earlier order.

C. Motion for Appropriate Relief

[3] Finally, Defendant filed a motion for appropriate relief on appeal pursuant to N.C. Gen. Stat. § 15A-1418(a) in which he asserts that his trial counsel failed to provide him with constitutionally effective representation in violation of the Sixth and Fourteenth Amendments to the United States Constitution. Attached to Defendant's motion was an affidavit executed by Defendant. In his affidavit, Defendant verified the accuracy of the factual statements contained in his motion for appropriate relief, including the contention that he received a retroactive benefit payment from the Department of Veterans Affairs

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in mid-March 2009 totaling approximately \$11,000.00. In addition, a letter from the Department of Veterans Affairs dated 11 February 2009, in which the Department stated that his monthly benefit payment would be increased to \$2,623.00 effective 1 June 2008, decreased to \$2,527.00 effective 16 September 2008, and increased to \$2,673.00 effective 1 December 2008, was attached to Defendant's affidavit. In his motion for appropriate relief, Defendant contends that his trial counsel was ineffective because he failed to either "obtain documentation from the [Department of Veterans Affairs] to give to [Judge Albright and the trial court] to support the request that Defendant be continued on probation" or to "ask[] for a continuance to allow counsel to contact [the Department of Veterans Affairs] to get the latest information on when Defendant's money would be received." We are not persuaded by the argument advanced in Defendant's motion for appropriate relief.

"When a motion for appropriate relief is made in the appellate division, the appellate court must decide whether the motion may be determined on the basis of the materials before it, whether it is necessary to remand the case to the trial division for taking evidence or conducting other proceedings, or, for claims of factual innocence, whether to refer the case for further investigation to the North Carolina Innocence Inquiry Commission[.]" Although N.C. Gen. Stat. § 15A-1418(b) does not expressly reference the provision of N.C. Gen. Stat. § 15A-1420(c)(1) stating that "[a]ny party is entitled to a hearing on questions of law or fact arising from the motion and any supporting or opposing information presented unless the court determines that the motion is without merit[.]" we believe that the same basic principle should be utilized in connection with an appellate court's initial evaluation of a motion for appropriate relief on appeal filed pursuant to N.C. Gen. Stat. § 15A-1418(a). *See State v. McHone*, 348 N.C. 254, 257, 499 S.E.2d 761, 763 (1998) (stating that, "if the trial court can determine from the motion and any supporting or opposing information presented that the motion is without merit, it *may* deny the motion without any hearing either on questions of fact or questions of law, including constitutional questions") (emphasis in the original). As a result, our initial responsibility in connection with our evaluation of Defendant's motion for appropriate relief on appeal is determining whether that motion is potentially meritorious so that this case should be remanded to the Randolph County Superior Court for an evidentiary hearing.

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A defendant seeking to establish that he or she received constitutionally deficient representation “must satisfy a two part test.” *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985).

First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693, 104 S. Ct. 2052, 2064 (1984). Thus, we will proceed to examine the potential merits of Defendant’s ineffective assistance of counsel claim utilizing the standard set out in *Braswell* and *Strickland*.

A careful reading of Defendant’s motion for appropriate relief provides no indication that the information upon which he relies was available at the time of the hearings held before Judge Albright and the trial court. Instead, the first item of information in the record tending to show that Defendant would definitely receive an increased or additional benefit payment from the Department of Veterans Affairs appears to be the 11 February 2009 letter that is attached to Defendant’s affidavit. Neither Defendant’s motion nor his affidavit tend to show that the information upon which Defendant now relies would have been available to his trial counsel on either 27 October 2008 or 8 December 2008. Given that set of circumstances, we cannot conclude that Defendant’s trial counsel should be deemed to have provided him with deficient representation based on a failure to present information that has not been shown to have existed at the time of the hearings held before Judge Albright and the trial court or a failure to seek a continuance based on that information. As a result, in light of Defendant’s failure to demonstrate that the documentation upon which he now relies could have been produced on either 27 October 2008 or 1 December 2008, we conclude that Defendant’s motion for appropriate relief on appeal lacks merit and should be denied without the necessity for further proceedings before this Court or the Randolph County Superior Court.

III. Conclusion

Thus, for the reasons set forth above, we conclude that Defendant did not lodge a timely appeal from Judge Albright’s order

revoking his probation and activating his suspended sentences, that the trial court did not abuse its discretion by committing Defendant to the custody of the Department of Correction to serve his suspended sentences, and that Defendant's motion for appropriate relief is without merit and should be denied. As a result, the trial court's order should be, and hereby is, affirmed.

AFFIRMED.

Judges McGEE and STROUD concur.

IN THE MATTER OF: J.N.S., A.L.M., J.N.S., T.A.S.

No. COA10-499

(Filed 2 November 2010)

1. Appeal and Error— motion to dismiss appeal—timely notice of appeal—adjudication order

Petitioner's motion to dismiss respondent's appeal from an order adjudicating her minor children neglected and dependent was denied. An order of disposition, and the adjudication order upon which it is based, become final orders which may be appealed from pursuant to N.C.G.S. § 7B-1001 when the disposition order is entered. Respondent timely appealed from the adjudication and disposition orders within 30 days of the entry of the disposition order.

2. Child Abuse, Dependency, and Neglect— adjudication—consent order—no direct inquiry of respondent required—preservation of issue

The trial court did not err by failing to directly inquire of respondent whether she assented to a consent order adjudicating her minor children neglected and dependent and instead relying on the assent of her attorney. Moreover, respondent failed to object to the entry of the consent order and did not preserve the issue for appeal.

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3. Child Abuse, Dependency, and Neglect— findings not supported by competent evidence—conclusions not supported by findings

The trial court's conclusions of law and ultimate disposition were not supported by the findings of fact and the disposition order was vacated. The trial court did not err in making findings of fact based on reports from the guardian *ad litem* and the Department of Social Services and those findings were supported by the evidence. However, the trial court's findings of fact based on statements made by the parties and other individuals who had not been duly sworn were not based on competent evidence.

4. Child Abuse, Dependency, and Neglect— disposition order cessation of reunification efforts—inadequate findings

The trial court erred in an abuse, neglect, and dependency proceeding by ordering the Department of Social Services to file a petition to terminate respondent's parental rights, effectively determining that reunification efforts between respondent and her minor children should cease, without making the requisite findings of fact under N.C.G.S. § 7B-507.

Appeal by respondent-mother from orders entered 5 and 11 January 2010 by Judge K. Michelle Fletcher in Guilford County District Court. Heard in the Court of Appeals 29 September 2010.

Guilford County Department of Social Services, by Mercedes O. Chut, for petitioner-appellee.

Smith, James, Rowlett & Cohen, L.L.P., by Margaret Rowlett, for Guardian ad Litem.

Richard E. Jester, for respondent-appellant mother.

CALABRIA, Judge.

Respondent-mother appeals (1) the trial court's order adjudicating her minor children neglected and dependent; and (2) the trial court's order of disposition. We affirm in part and vacate and remand in part.

1. Pseudonyms have been used to protect the identities of the children.

I. Background

Respondent-mother is the biological mother of four children, J.N.S. (“Jason”), A.L.M. (“Alice”), J.N.S. (“Janice”), and T.A.S. (“Tiffany”) (collectively “the minor children”).¹ R.S. has been judicially established as the father of Jason and is the putative father of Tiffany and Janice. M.M. is the putative father of Alice.²

Guilford County Department of Social Services (“DSS” or “petitioner”) has been involved with respondent-mother since 2003. On 1 November 2003, DSS filed a juvenile petition alleging that Jason, respondent-mother’s oldest child, was an abused and neglected juvenile. At the time, Jason was approximately two months old and had bruises on his forehead, bruises under his eyes, a scratch on his face, and several fractured ribs. Consequently, on 12 November 2003, Jason was adjudicated abused and neglected. R.S. was charged with felony child abuse of Jason and subsequently pled guilty to that charge on 25 August 2004. Respondent-mother then entered into a case plan with DSS and worked toward reunification with Jason. On 3 June 2005, the trial court found that respondent-mother had completed all conditions of reunification successfully and Jason was returned to the custody of respondent-mother.

Respondent-mother subsequently gave birth to Alice, Janice, and Tiffany. On 2 September 2009, DSS received an anonymous report that (1) the minor children played outside unsupervised; (2) there were domestic issues between M.M. and respondent-mother; (3) M.M. locked respondent-mother out of the house; (4) the children yelled and screamed inside while respondent-mother banged on the door to be let in; and (5) respondent-mother ultimately called the police to regain entry to her home.

During a subsequent investigation, DSS determined that M.M. was on probation for a strangulation offense against respondent-mother and that M.M. violated his probation by testing positive for marijuana. On 28 September 2009, DSS interviewed the minor children and learned that there was continued violence between M.M. and respondent-mother.

On 29 September 2009, DSS conducted a Team Decision Making Meeting (“TDM Meeting”) with M.M. and respondent-mother regarding the domestic violence concerns that had arisen as a result of the

2. R.S. and M.M. are not parties to this appeal.

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DSS investigation. At that meeting, DSS recommended that M.M. move out of respondent-mother's home and that respondent-mother and M.M. not have any contact in the minor children's presence. Following this TDM Meeting, respondent-mother reported, during a subsequent home visit by DSS on 9 October 2009, that M.M. and respondent-mother had been together twice in the ten days after the TDM Meeting. Additionally, M.M. was arrested on 10 October 2009 as a result of a 9 October 2009 domestic violence incident with respondent-mother. DSS held two more TDM Meetings regarding the minor children on 12 October and 20 October 2009. Following a recommendation from the 12 October 2009 TDM Meeting, the minor children were placed with their maternal grandparents. At the 20 October 2009 TDM Meeting, the maternal grandparents reported to DSS that they were overwhelmed caring for the minor children and would be unable to continue doing so.

On 21 October 2009, DSS filed a new juvenile petition alleging all four minor children were neglected and dependent juveniles. Specifically, DSS alleged that the minor children were neglected in that they lived in an environment injurious to their welfare, and that the minor children were dependent in that their parents were unable to provide for their care or supervision and lacked an appropriate alternative child care arrangement. As a result of the petition, the trial court placed the minor children in the nonsecure custody of DSS.

An adjudicatory hearing was held on 20 November 2009 in Guilford County District Court. At the hearing, the parties consented to the trial court adjudicating the minor children as neglected and dependent. The trial court continued disposition until 11 December 2009. Although the trial court announced its adjudication in open court on 20 November 2009, it did not enter its order adjudicating the minor children neglected and dependent juveniles until 5 January 2010.

After the dispositional hearing on 11 December 2009, the trial court announced an oral disposition. The trial court then entered its written disposition order on 11 January 2010. The minor children were ordered to remain in the legal and physical custody of DSS, and respondent-mother was granted one hour of visitation per week. Additionally, DSS was ordered to file a petition to terminate respondent-mother's parental rights. On 27 January 2010, respondent-mother filed notice of appeal from the disposition order. On 8 February 2010, respondent-mother filed an amended notice of appeal from the adjudication order and the disposition order.

II. Notice of Appeal

[1] As an initial matter, we address the contention in petitioner’s brief that respondent-mother failed to give timely notice of appeal from the trial court’s adjudication order, and that as a result, this Court lacks subject-matter jurisdiction to hear respondent-mother’s appeal of that order. “It is well established that ‘[f]ailure to give timely notice of appeal . . . is jurisdictional, and an untimely attempt to appeal must be dismissed.’” *In re A.L.*, 166 N.C. App. 276, 277, 601 S.E.2d 538, 538 (2004) (quoting *In re Lynette H.*, 323 N.C. 598, 602, 374 S.E.2d 272, 274 (1988)). In juvenile cases, “notice of appeal shall be given in writing . . . and shall be made within 30 days after entry and service of the order[.]” N.C. Gen. Stat. § 7B-1001(b) (2009).

Any party entitled by law to appeal from a trial court judgment or order rendered in a case involving . . . issues of juvenile dependency or juvenile abuse and/or neglect, appealable pursuant to N.C.G.S. § 7B-1001, may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all parties in the time and manner set out in Chapter 7B of the General Statutes of North Carolina.

N.C.R. App. P. 3.1(a) (2009). Pursuant to N.C. Gen. Stat. § 7B-1001(a), “appeal of a final order of the court in a juvenile matter shall be made directly to the Court of Appeals. Only the following juvenile matters may be appealed: . . . (3) [a]ny initial order of disposition and the adjudication order upon which it is based.” N.C. Gen. Stat. § 7B-1001(a) (2009). Petitioner’s argument is premised on an interpretation of N.C. Gen. Stat. § 7B-1001(a)(3) that would treat the trial court’s adjudication and disposition orders as separate, final orders which would each require a separate and timely notice of appeal. In contrast, respondent-mother urges this Court to interpret § 7B-1001(a)(3) as treating the adjudication and disposition orders as conjunctive orders from which timely notice of appeal would be calculated from the entry of the disposition order. In order to determine the correct interpretation of N.C. Gen. Stat. § 7B-1001(a)(3), we examine the statutory procedure involved in abuse, neglect, or dependency proceedings.

An abuse, neglect, or dependency action “is commenced by the filing of a petition[.]” N.C. Gen. Stat. § 7B-405 (2009). “Just as a termination of parental rights proceeding involves a two stage process, so does a proceeding adjudicating whether a child is abused or neglected.” *In re O.W.*, 164 N.C. App. 699, 701, 596 S.E.2d 851, 853

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(2004). In the first phase of the proceedings, the district court conducts an adjudicatory hearing on the basis of the petition. “The adjudicatory hearing shall be a judicial process designed to adjudicate the existence or nonexistence of any of the conditions alleged in a petition.” N.C. Gen. Stat. § 7B-802 (2009). At the completion of the adjudicatory hearing,

[i]f the court finds that the allegations in the petition have been proven by clear and convincing evidence, the court shall so state. If the court finds that the allegations have not been proven, the court shall dismiss the petition with prejudice, and if the juvenile is in nonsecure custody, the juvenile shall be released to the parent, guardian, custodian, or caretaker.

...

The adjudicatory order shall be in writing and shall contain appropriate findings of fact and conclusions of law. The order shall be reduced to writing, signed, and entered no later than 30 days following the completion of the hearing.

N.C. Gen. Stat. § 7B-807 (2009). Thus, if the petitioner fails to prove the facts alleged in the petition, the trial court shall dismiss the petition and that order becomes the final order of the trial court. Such an order is appealable pursuant to N.C. Gen. Stat. § 7B-1001(a)(2), which permits appeals from “[a]ny order, including the involuntary dismissal of a petition, which in effect determines the action and prevents a judgment from which appeal might be taken. N.C. Gen. Stat. § 7B-1001(a)(2) (2009).

However, if the trial court finds that the allegations in the petition have been proven by clear and convincing evidence, the resulting adjudication order is not a final order, as our statutes then require the trial court to proceed to the second stage of abuse, neglect, or dependency proceedings, disposition.

The dispositional hearing shall take place immediately following the adjudicatory hearing and shall be concluded within 30 days of the conclusion of the adjudicatory hearing. The dispositional hearing may be informal and the court may consider written reports or other evidence concerning the needs of the juvenile. The juvenile and the juvenile’s parent, guardian, or custodian shall have the right to present evidence, and they may advise the court concerning the disposition they believe to be in the best interests of the juvenile. The court may consider any evidence,

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including hearsay evidence as defined in G.S. 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition. The court may exclude the public from the hearing unless the juvenile moves that the hearing be open, which motion shall be granted.

N.C. Gen. Stat. § 7B-901 (2009). After the dispositional hearing is completed, N.C. Gen. Stat. § 7B-903 provides the trial court with a number of dispositional alternatives, “and the court may combine any of the applicable alternatives when the court finds the disposition to be in the best interests of the juvenile[.]” N.C. Gen. Stat. § 7B-903 (2009).

The dispositional order shall be in writing, signed, and entered no later than 30 days from the completion of the hearing, and shall contain appropriate findings of fact and conclusions of law. The court shall state with particularity, both orally and in the written order of disposition, the precise terms of the disposition including the kind, duration, and the person who is responsible for carrying out the disposition and the person or agency in whom custody is vested.

N.C. Gen. Stat. § 7B-905 (2009).

Although the adjudication and disposition orders are separate orders under our statutes, they are inexorably linked by the plain language of N.C. Gen. Stat. § 7B-1001(a)(3) and the procedure involved in neglect, abuse, or dependency proceedings. An adjudication order that determines a child is abused, neglected, or dependent necessarily requires the additional entry of a disposition order to address the child’s underlying situation which led to the adjudication. Conversely, a disposition order cannot be entered without an initial adjudication of abuse, neglect, or dependency.

Adopting petitioner’s proposed interpretation of N.C. Gen. Stat. § 7B-1001(a)(3) would cause significant problems for appeals from abuse, neglect, or dependency cases. If, as petitioner suggests, the adjudication order and the disposition order were separate, final orders which required separate notices of appeal, this Court would consistently be faced with independent, disjunctive appeals of related and dependent orders which were entered less than 60 days apart. Under such circumstances, this Court would be faced with the potential of reviewing a disposition order prior to an appellate deter-

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mination of the validity of the adjudication order upon which it was based. Since the entry of a valid disposition order necessarily depends upon the entry of a valid adjudication order, it is simply illogical to construe N.C. Gen. Stat. § 7B-1001(a)(3) to allow separate and independent appeals of each of these orders. "In construing statutes courts normally adopt an interpretation which will avoid absurd or bizarre consequences, the presumption being that the legislature acted in accordance with reason and common sense and did not intend untoward results." *State ex rel. Com'r of Ins. v. N.C. Auto. Rate Admin. Office*, 294 N.C. 60, 68, 241 S.E.2d 324, 329 (1978). In light of this rule of statutory interpretation, and construing the plain language of N.C. Gen. Stat. § 7B-1001(a)(3) and other provisions of Chapter 7B *in pari materia*, we determine that it is not until the disposition order is entered that both the initial order of disposition and the adjudication order upon which it is based become final orders which may be appealed from pursuant to N.C. Gen. Stat. § 7B-1001. Thus, we interpret N.C. Gen. Stat. § 7B-1001 to require notice of appeal to be entered for any initial order of disposition and the adjudication order upon which it is based within 30 days of the entry of the disposition order.

In the instant case, the trial court entered its order adjudicating the minor children neglected and dependent on 5 January 2010. The adjudication order was served by depositing a copy in the United States mail on 5 January 2010 to respondent-mother. The trial court then entered its disposition order on 11 January 2010. The disposition order was served on respondent-mother by depositing a copy in the United States mail on 11 January 2010. Accordingly, the deadline for filing notice of appeal from the trial court's adjudication order and the disposition order was 10 February 2010. On 27 January 2010, respondent-mother timely filed notice of appeal from the 11 January 2010 disposition order only. On 8 February 2010, respondent-mother filed an amended notice of appeal, referencing both the adjudication and disposition orders. Since this amended notice of appeal was filed within 30 days of the entry of the disposition order, respondent-mother's appeal of both the adjudication order and the disposition order are properly before this Court.

III. Adjudication Order

[2] Respondent-mother argues the trial court erred by not directly inquiring whether she assented to the consent order and instead relying on the assent of her attorney. Respondent-mother contends that

prior to entering into a consent order in abuse, neglect or dependency cases, the trial court may not rely on the statements of counsel, but instead is constitutionally required to specifically obtain, on the record, the consent of the juveniles' parents named in the petition in order to enter a consent order regarding abuse, neglect, or dependency. We disagree.

Nothing in this Article precludes the court from entering a consent order or judgment on a petition for abuse, neglect, or dependency when all parties are present, the juvenile is represented by counsel, and all other parties are either represented by counsel or have waived counsel, and sufficient findings of fact are made by the court.

N.C. Gen. Stat. § 7B-902 (2009). In the instant case, respondent-mother's attorney consented, on the record, to an adjudication of neglect and dependency. The record also indicates that respondent-mother's attorney drafted a proposed consent order which became most of the actual consent adjudication order. There is no evidence in the record that respondent-mother objected to the entry of this consent order.

"In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(a)(1) (2009). "Moreover, it is well settled that a constitutional issue not raised in the lower court will not be considered for the first time on appeal." *In re S.C.R.*, — N.C. App. —, —, 679 S.E.2d 905, 908 (2009). Since respondent-mother did not object to the entry of the consent adjudication order or the stipulations contained in the order, she has not preserved this issue for appellate review. Respondent-mother's argument is overruled.

IV. Disposition Order

[3] Respondent-mother argues the trial court erred in entering its disposition order without taking sufficient evidence to support the trial court's findings of fact. While we disagree with respondent-mother's argument that the trial court's findings which were based upon the DSS and guardian *ad litem* reports were unsupported, we agree that the disposition order contains some findings of fact which were not supported by competent evidence.

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Respondent-mother contends that the trial court erred by making findings of fact based upon DSS and guardian *ad litem* reports. The dispositional hearing following an abuse, neglect, or dependency adjudication “may be informal and the court may consider written reports or other evidence concerning the needs of the juvenile.” N.C. Gen. Stat. § 7B-901 (2009). In dispositional hearings, “trial courts may properly consider all written reports and materials submitted in connection with said proceedings.” *In re Ivey*, 156 N.C. App. 398, 402, 576 S.E.2d 386, 390 (2003) (internal quotation omitted). Thus, at a dispositional hearing, “[a] trial court may consider written reports and make findings based on these reports so long as it does not ‘broadly incorporate these written reports from outside sources as its findings of fact.’” *In re C.M.*, 183 N.C. App. 207, 213, 644 S.E.2d 588, 594 (2007) (quoting *In re J.S.*, 165 N.C. App. 509, 511, 598 S.E.2d 658, 660 (2004)).

In the instant case, the trial court received and reviewed reports from both the guardian *ad litem* and DSS. However, the trial court did not state in the disposition order that it was merely incorporating the DSS and guardian *ad litem* reports as its findings of fact. Rather, the trial court made independent findings of facts based upon the information contained in the reports which the trial court deemed credible. Since the use of these reports as evidence is permitted by N.C. Gen. Stat. § 7B-901, these reports provided sufficient evidence to support many of the findings of fact in the disposition order. *See In re M.J.G.*, 168 N.C. App. 638, 648-49, 608 S.E.2d 813, 819 (2005) (“Based upon this Court’s holding in *In re Ivey* and N.C. Gen. Stat. § 7B-901, we conclude the trial court did not erroneously consider the DSS and guardian *ad litem* reports in making its disposition.”).

However, the trial court’s order also contains numerous findings that include information not contained in either the DSS or guardian *ad litem* reports. During the dispositional hearing, the trial court addressed various parties and family members, but none of these individuals were ever placed under oath when they provided information to the trial court. Our statutes make clear that the dispositional hearing is an informal hearing “in which the formal rules of evidence do not apply.” *M.J.G.*, 168 N.C. App. at 648, 608 S.E.2d at 819. Nonetheless, we do not believe that this informality excuses the necessity of having evidence which is based upon sworn testimony if the trial court chooses to rely on information obtained from individuals in addition to reports submitted to the court. Thus, we conclude that the trial court’s findings which were based upon statements made by the parties and other individuals who had not been duly sworn were not based upon competent

evidence. The remaining findings contained in the order do not adequately support the trial court's conclusions of law and ultimate disposition. Accordingly, we vacate the trial court's Continued Dispositional Order entered 11 January 2010 and remand for further proceedings.

[4] B. Cessation of Reunification

[4] Respondent-mother additionally argues that, in its disposition order, the trial court ordered the cessation of reunification efforts with the minor children without making the findings required by N.C. Gen. Stat. § 7B-507. We agree.

When a trial court enters “[a]n order placing or continuing the placement of a juvenile in the custody or placement responsibility of a county department of social services, whether an order for continued nonsecure custody, a dispositional order, or a review order[,]” it is required to include in its order, *inter alia*, “findings as to whether a county department of social services should continue to make reasonable efforts to prevent or eliminate the need for placement of the juvenile, unless the court has previously determined or determines under subsection (b) of this section that such efforts are not required or shall cease[.]” N.C. Gen. Stat. § 7B-507(a) (2009).

In the instant case, the disposition order does not explicitly cease reunification efforts. Instead, the order simply directs DSS to “proceed with filing a petition to terminate the parental rights of [respondent-mother]” However, since the disposition order ordered legal and physical custody of the minor children to remain with DSS, the trial court was required by N.C. Gen. Stat. § 7B-507(a) to either find that reasonable efforts at reunification should continue or find that such efforts should cease and make the additional findings required by N.C. Gen. Stat. § 7B-507(b).

Although the trial court failed to make any findings regarding reasonable efforts at reunification, the language of the disposition order indicates that the trial court effectively determined that reunification efforts between respondent-mother and the minor children should cease when it ordered DSS to file a petition to terminate respondent-mother's parental rights. As our Supreme Court has stated, “[t]he cessation of reunification efforts is a natural and appropriate result of a court's order initiating a termination of parental rights.” *In re Brake*, 347 N.C. 339, 340, 493 S.E.2d 418, 419 (1997). The *Brake* Court stressed that

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[i]t would be a vain effort, at best, for a court to enter an order that had the effect of directing DSS to undertake to terminate the family unit while at the same time ordering that it continue its efforts to reunite the family. In fact, *such an order would tend to be both internally inconsistent and self-contradictory.*

Id. at 341, 493 S.E.2d at 420 (emphasis added). Accordingly, the trial court's directive to DSS to file a petition to terminate respondent-mother's parental rights implicitly also directed DSS to cease reasonable efforts at reunification.³

In any order placing a juvenile in the custody or placement responsibility of a county department of social services, whether an order for continued nonsecure custody, a dispositional order, or a review order, the court may direct that reasonable efforts to eliminate the need for placement of the juvenile shall not be required or shall cease if the court makes written findings of fact that:

- (1) Such efforts clearly would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time;
- (2) A court of competent jurisdiction has determined that the parent has subjected the child to aggravated circumstances as defined in G.S. 7B-101;
- (3) A court of competent jurisdiction has terminated involuntarily the parental rights of the parent to another child of the parent; or
- (4) A court of competent jurisdiction has determined that: the parent has committed murder or voluntary manslaughter of another child of the parent; has aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of the child or another child of the parent; or has committed a felony assault resulting in serious bodily injury to the child or another child of the parent.

3. We are concerned about whether the trial court had the authority to establish a permanent plan for the minor children in the disposition order based on this Court's decision in *In re D.C., C.C.*, 183 N.C. App. 344, 644 S.E.2d 640 (2007). In *D.C.*, this Court reversed an order that awarded guardianship of two minor children in a disposition order that followed an adjudication of the minor children as neglected. *Id.* at 356, 644 S.E.2d at 647. The *D.C.* Court held that "N.C. Gen. Stat. §§ 7B-507 and 907 do not permit the trial court to enter a permanent plan for a juvenile during disposition. . . ." *Id.*, 644 S.E.2d at 646-47. However, respondent-mother does not argue that the holding of *D.C.* applies to the instant case.

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N.C. Gen. Stat. § 7B-507(b) (2009). The disposition order does not contain the findings required by this statute. Thus, we additionally remand this case for further findings of fact pursuant to N.C. Gen. Stat. § 7B-507(b).

V. Conclusion

The record on appeal contains additional proposed issues on appeal not argued by respondent-mother in her brief. Pursuant to N.C.R. App. P. 28(b)(6) (2009), we deem these additional proposed issues abandoned and do not address them.

Notice of appeal for an adjudication order and its accompanying disposition order in an abuse, neglect, or dependency proceeding must be filed within 30 days of the entry of the disposition order. Since respondent-mother filed a notice of appeal for both orders within 30 days of the trial court's entry of the disposition order, her appeal as to both orders was properly before this Court.

The trial court properly entered the consent adjudication order, and that order is affirmed. However, the trial court erred by entering a disposition order which contained findings of fact that were not supported by competent evidence. Thus, we vacate the disposition order and remand the case to the trial court for further proceedings. It is within the trial court's discretion to allow additional evidence prior to making findings of fact and conclusions of law. *In re J.S.*, 165 N.C. App. at 514, 598 S.E.2d at 662 (citation omitted). Because the trial court's disposition order directed DSS to file a petition to terminate respondent-mother's parental rights, it implicitly ordered reasonable efforts at reunification between respondent-mother and the minor children to cease. As a result, on remand, the disposition order must contain the findings required by N.C. Gen. Stat. § 7B-507(b).

Affirmed in part; vacated and remanded in part.

Judges HUNTER, Robert C. and GEER concur.

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ROBERT L. NOBLES, JR., EMPLOYEE, PLAINTIFF v. COASTAL POWER & ELECTRIC, INC.,
EMPLOYER, AMERICAN INTERSTATE INSURANCE COMPANY, (AMERISAFE,
ADMINISTRATOR), CARRIER, DEFENDANTS

No. COA10-321

(Filed 2 November 2010)

1. Workers' Compensation— suitable employment refused— supported by the evidence

The Industrial Commission's conclusion that plaintiff unjustifiably refused defendant's multiple offers of a suitable fleet manager's assistant position was supported by the findings of fact, which were in turn supported by competent evidence of record.

2. Workers' Compensation— disability—earning capacity— credibility of expert

Plaintiff's argument that the Industrial Commission erred in finding that plaintiff's expert did not offer an opinion regarding plaintiff's earning capacity and in concluding that plaintiff was not disabled was overruled. The Commission is the exclusive judge of credibility and it was within its authority to give little weight to plaintiff's expert's testimony.

Appeal by Plaintiff from opinion and award entered 5 January 2009 by the North Carolina Industrial Commission. Heard in the Court of Appeals 15 September 2010.

Greg Jones & Associates, P.A., by Cameron D. Simmons, for Plaintiff-Appellant.

Brooks, Stevens & Pope, P.A., by Michael C. Sigmon and Becky B. Johnson, for Defendants-Appellees.

BEASLEY, Judge.

Robert L. Nobles, Jr. (Plaintiff) appeals from an opinion and award of the Full Commission of the North Carolina Industrial Commission (the Commission) awarding him temporary total disability benefits from the date of injury but no further than the date he attained maximum medical improvement. Specifically, Plaintiff challenges the Commission's findings that he unjustifiably refused suitable employment offered by Coastal Power & Electric, Inc. (Defendant or Employer) and that Plaintiff failed to prove disability beyond the date he reached maximum medical improvement. For the following reasons, we affirm the Commission's award.

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Defendant corporation builds transmission power lines in North and South Carolina and maintains its home office in Wilmington, North Carolina. Plaintiff resides in Cerro Gordo, North Carolina and has worked for Defendant and its predecessors for over twenty years, performing power line installation at the employer's various job sites. The parties herein stipulated that on 4 August 2005, Plaintiff sustained a compensable injury to his left leg. Defendant and its carrier, American Interstate Insurance Company, (collectively Defendants) accepted Plaintiff's claim on 18 August 2005 and began providing disability and medical compensation at that time. On 10 April 2008, Defendants filed a Form 33 request for a hearing on the ground that Plaintiff was no longer totally disabled. The Commission reviewed the matter on 17 November 2009.

Plaintiff was admitted to the hospital on the date of injury, and his leg fracture was surgically stabilized by Dr. Frank Noojin. Following his discharge from the hospital, Plaintiff underwent three additional surgeries, and on 21 January 2008, Dr. Noojin opined that he had reached maximum medical improvement (MMI). Plaintiff received a Functional Capacity Evaluation (FCE) that determined he was capable of work at a medium physical demand level. Defendant identified two positions, radio operator and fleet manager's assistant, both of which were largely sedentary, as likely within Plaintiff's work restrictions. Dr. Noojin approved both positions but commented that he believed the fleet manager's assistant position better suited Plaintiff. Thereafter, Plaintiff returned to Dr. Noojin with complaints of left knee pain, and an MRI was ordered, which revealed a medial meniscus tear that Dr. Noojin related to Plaintiff's 4 August 2005 compensable injury. Dr. Noojin rescinded Plaintiff's MMI status, and left knee surgery was performed on 1 July 2008.

Plaintiff was released to light-duty sedentary work on 7 July 2008, and on 30 July 2008, he was advised that the sedentary office position of fleet manager's assistant, which had been only intermittently filled in the past, remained available to him at a rate of \$19.50 per hour. Plaintiff indicated that, because he had not yet reached MMI, he would be willing to try the position on the condition that a company truck be furnished for Plaintiff's use. Acknowledging that a company truck had previously been provided as a necessary component of Plaintiff's pre-injury job, Defendant explained that company trucks are not provided for office staff positions and denied Plaintiff's demand. The fleet manager assistant's position was again offered to Plaintiff by letter dated 8 October 2008. On or about 23 December

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2008, Dr. Noojin released Plaintiff at MMI with medium-duty work restrictions, consistent with the FCE performed in February. However, Dr. Noojin testified that although the FCE revealed a medium-duty capacity to work, Plaintiff's sustained physical capabilities are more consistent with a light-duty job. Dr. Noojin also testified that he had no concerns regarding Plaintiff's ability to perform the fleet manager's assistant position. While Dr. Noojin had previously opined to Plaintiff's counsel that it would not be appropriate for Plaintiff to commute the 60.3 miles from Cerro Gordo to Defendant's office in Wilmington, he later testified to his opinion that Plaintiff is physically capable of performing the drive to perform the fleet manager's assistant position.

The Commission found the fleet manager's assistant position to be suitable employment, unjustifiably refused by Plaintiff. The Commission also found that Plaintiff failed to establish that he was unable to earn his pre-injury average weekly wage in any employment as a result of his compensable injury. Accordingly, the Commission concluded that Plaintiff failed to prove disability and was entitled to temporary total disability payments at a weekly rate of \$514.38 from 4 August 2005 through 23 December 2008 and no further, subject to a credit for any disability benefits already paid by Defendants beyond that date. Plaintiff appeals.

On appeal from the Full Commission's opinion and award, this Court's task is "limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). "The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (citation omitted). Thus, our "duty goes no further than to determine whether the record contains any evidence tending to support the finding," and this Court "does not have the right to weigh the evidence and decide the issue on the basis of its weight." *Deese*, 352 N.C. at 115, 530 S.E.2d at 552 (internal quotation marks and citations omitted). As such, the Commission's findings of fact "are conclusive on appeal when supported by [any] competent evidence, even though there be evidence that would support findings to the contrary," *Id.* at 116, 530 S.E.2d at 552-53 (internal quotation marks and citations omitted), and may be set aside only "when there is a complete lack of competent evidence to support them," *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230,

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538 S.E.2d 912, 914 (2000). However, the Commission's conclusions of law are reviewed de novo. *Ramsey v. Southern Indus. Constructors, Inc.*, 178 N.C. App. 25, 30, 630 S.E.2d 681, 685 (2006).

I.

[1] Plaintiff contends that the Commission erred by mistakenly applying the law regarding "make-work" and determining that the fleet manager's assistant position offered Plaintiff by Defendant was suitable employment.

The Workers' Compensation Act provides that an injured employee is not entitled to compensation if he unjustifiably "refuses employment procured for him suitable to his capacity." N.C. Gen. Stat. § 97-32 (2009). "Clearly, if the proffered employment is not suitable for the injured employee, the employee's refusal thereof cannot be used to bar compensation to which the employee is otherwise entitled." *Moore v. Concrete Supply Co.*, 149 N.C. App. 381, 389, 561 S.E.2d 315, 320 (2002). "Suitable employment" is defined as "any job that a claimant is capable of performing considering his age, education, physical limitations, vocational skills, and experience." *Shah v. Howard Johnson*, 140 N.C. App. 58, 68, 535 S.E.2d 577, 583 (2000) (internal quotation marks and citation omitted). The employer bears the burden of showing that an employee refused suitable employment. *Gordon v. City of Durham*, 153 N.C. App. 782, 787, 571 S.E.2d 48, 51 (2002). Once the employer makes this showing, the burden shifts to the employee to show that the refusal was justified. *See, e.g., Moore*, 149 N.C. App. at 389-90, 561 S.E.2d at 320.

Plaintiff challenges finding of fact 34, which is essentially a mixed finding of fact and conclusion of law that states:

The competent credible evidence establishes that [P]laintiff is physically capable of performing the Fleet Manager's Assistant position. The position is a legitimate position with Defendant-Employer, which even though it has been intermittently filled in the past, has become necessary on a regular basis due to the growth of Defendant-Employer's business. Dr. Noojin's opinions were equivocal at best regarding whether Plaintiff could drive to Wilmington each day to perform the job. Plaintiff himself did not testify that he could not make the drive and the evidence indicates that Plaintiff was more concerned about whether he would be provided with a company truck to make the drive. For these reasons, the Full Commission finds that the Fleet Manager's Assistant position constitutes suitable employment for Plaintiff, which Plaintiff unjustifiably refused.

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Plaintiff alleges that finding of fact 34 evinces three errors that were made by the Commission: (1) the Commission looked only to Defendant rather than the competitive labor market when determining job suitability; (2) the Commission failed to consider the clerical nature of the position and comparable wages for such a job; and (3) the Commission did not make findings to show it considered the distance between the proffered job location and Plaintiff's home.

In *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 342 S.E.2d 798 (1986), our Supreme Court addressed an injured employee's allegation that the newly created position offered him by his employer, which was designed to accommodate his post-injury limitations and had never before been extended to any other individual, was not suitable employment. The Court held that employers may not "avoid paying compensation merely by creating for their injured employees makeshift positions not ordinarily available in the market." *Id.* at 444, 342 S.E.2d at 810; see also *Moore*, 149 N.C. App. at 389-90, 561 S.E.2d at 320 ("[A]n employer cannot avoid its duty to pay compensation by offering the employee a position that could not be found elsewhere under normally prevailing market conditions."). Addressing an employee's contention that he did not unjustifiably refuse suitable employment because the position offered was make-work, our Court explained: "[I]f other employers would not hire the employee with the employee's limitations at a comparable wage level . . . [or] if the proffered employment is so modified because of the employee's limitations that it is not ordinarily available in the competitive job market, the job is 'make work' and is not competitive." *Munns v. Precision Franchising, Inc.*, 196 N.C. App. 315, 319, 674 S.E.2d 430, 434 (2009) (internal quotation marks and citation omitted).

The Commission made the following pertinent findings of fact:

12. Defendant-Employer identified two positions, Radio Operator and Fleet Manager's Assistant, as likely within Plaintiff's work restrictions. The Fleet Manager's Assistant position is an office staff position.

13. Regina Sander, Plaintiff's vocational rehabilitation specialist, performed a job analysis of both positions offered by Defendant-Employer. Both positions are to a large extent sedentary.

14. On April 30, 2008, Ms. Sander discussed both jobs with Dr. Noojin. Dr. Noojin was aware that the commute between Plaintiff's residence and Defendant-Employer's office is approximately 60

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miles. Dr. Noojin approved both positions; however, he commented that he felt the Fleet Manager's Assistant position was a better choice for Plaintiff. Plaintiff was restricted to light duty.

15. In the past, the Fleet Manager's Assistant position has only intermittently been filled. Employees placed into the Fleet Manager's Assistant position have thereafter been promoted into the Fleet Manager's position. Previous Fleet Manager's Assistants have earned between \$18.50 and \$27.00.

16. Due to the growth of Defendant-Employer's business, at least one additional person is required to carry out the management of the fleet. Defendant-Employer's fleet of over 400 vehicles includes tractors that haul heavy equipment, track machines, specialized machinery, pickup trucks, tool trailers, and line trucks. Plaintiff is familiar with each of these types of equipment.

As support for his argument that the Commission failed to look to the competitive labor market in determining that Defendant's offer was a legitimate position, Plaintiff relies on cases where the proffered position was newly created for the employee or heavily modified from an existing job with the employer.

In the instant case, however, competent evidence supported the Commission's finding regarding the legitimacy of the fleet manager's assistant position, as opposed to make-work, including testimony about the nature of the position as it existed both before it was offered to Plaintiff and also at the time it was extended. Michelle Swartz, office manager for Defendant, described the voluminous paperwork involved in managing more than 400 work vehicles and machines as "a two-person job." She testified that Defendant's first fleet manager was hired in 2003 through placement of an advertisement in the newspaper and that she served as both office manager and fleet manager's assistant at that time. Thereafter, the assistant's position was filled by new hires and sometimes by two outside consultants who divided the duties of fleet manager's assistant. At one time, the fleet manager was being assisted by two outside consultants and another office assistant due to the overwhelming volume of work.

Preston Free testified that he had obtained the position of fleet manager's assistant after posting a resume online and being contacted by Employer. He earned \$20.00 per hour based on similar work experience and "was under the impression that [he] was going to be hired on as a fleet manager assistant with the potential of going as the fleet man-

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ager.” As the current fleet manager, Mr. Free testified that he generally had to work 45 to 50 hours per week, even with the assistance of other office staff and outside consultants, because of the lack of an assistant. He also stated that in order to ensure Defendant’s compliance with federal and state regulations, at least one additional employee was needed to manage the fleet. Ms. Swartz also testified that there were additional duties that Mr. Free needed to assume as fleet manager but had been unable to do so without an assistant to aid him. Moreover, one of the consultants who had assisted the fleet manager testified that a fleet the size of that maintained by Defendant should be managed by two individuals, such as a manager and an assistant manager, and that with only one full-time employee in the department, Defendant’s record keeping was substandard.

Thus, competent evidence regarding the need for a fleet manager’s assistant and the nature of the position demonstrates that the job was neither created nor modified for Plaintiff. *Cf. Moore*, 149 N.C. App. at 390, 561 S.E.2d at 320 (determining the position constituted make-work specifically created for plaintiff because the position did not exist in the ordinary marketplace, was never advertised to the public, had never been offered previously offered by the employer and was never subsequently filled after being refused by plaintiff, and plaintiff was therefore justified in refusing such employment). Rather, the facts of the case *sub judice* are analogous to the findings in *Munns*, which this Court deemed sufficient to support the availability of the position in the job market. In *Munns*, we noted the Commission’s finding that the employer

“has offered this position to the general public in the past and there have been multiple service writers/advisors at the location where [employee] worked.” At the hearing, . . . [the] president of operations of employer[] testified that employer had service writers and service advisors in more than half of its stores, and that employer had offered the service writer/advisor position to the general public in the past. [He] further testified that he needed a service writer/advisor to improve his business. . . . [A] personnel director for employer[] testified that, at the time of the hearing, she had an advertisement running for the service writer/advisor position.

Munns, 196 N.C. App. at 320, 674 S.E.2d at 434 (first alteration in original). Where such evidence supported the Commission’s finding regarding the availability of the position in the job market,” we held that “[t]he service writer/advisor position offered to employee was a ‘real job,’ . . . available in the competitive job market” and left undisturbed the

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Commission's conclusion that the employee refused suitable employment on this ground. *Id.*

Similarly, the fleet manager assistant's job offered to Plaintiff in this case was a position which other employees had maintained before and after Defendant made the offers to Plaintiff. Defendant also offered Plaintiff his pre-injury position wage of \$19.50 per hour, which is within the range that past fleet manager's assistants have earned. Furthermore, the Commission found that "aside from Defendant-Employer's job offer, Plaintiff has made no effort to seek employment since his injury on August 4, 2005," which Plaintiff does not dispute. Thus, the findings of fact are supported by competent evidence that the position offered to Plaintiff was not especially created for Plaintiff, and as such, constituted an actual job ordinarily available in the competitive job market. Moreover, the Commission's unchallenged findings that previous fleet manager's assistants have earned hourly wages between \$18.50 and \$27.00, varying with experience, and that Defendant offered Plaintiff \$19.50 an hour, sufficiently demonstrate that the pay extended Plaintiff was commensurate with a competitive wage on the open market.

Plaintiff's argument that the Commission failed to address the effect of the distance between his house and proffered job on the suitability determination is meritless. Plaintiff claims that the Commission's findings regarding the distance concerned whether Plaintiff could physically perform the drive, notwithstanding the notion "that suitable employment for a person would normally be located within a reasonable commuting distance of that person's home." *Shah*, 140 N.C. App. at 68, 535 S.E.2d at 583-84. In *Shah*, however, the employer offered the employee his pre-injury job after the employee had moved in with his brother during his period of recovery, and the employee testified that he was not interested in returning to his pre-injury position based on "how [he] felt," not because of any concern about the distance from his new residence to the job location. *Id.* at 70, 535 S.E.2d at 584. This Court affirmed the Commission's finding that the employee's refusal to return to his pre-injury job was not due to the distance and was consequently unjustified. *See id.* at 68-70, 535 S.E.2d at 583-85.

The Commission likewise made several findings in the instant case to support its belief that Plaintiff's refusal of the proffered employment was not premised on the distance between his home and Defendant's Wilmington office:

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2. Plaintiff resides in Cerro Gordo, North Carolina. Defendant-Employer's home office is in Wilmington, North Carolina, which is 60.3 miles from Cerro Gordo.

. . . .

5. Plaintiff often had to drive further than the distance between his residence and Wilmington to get from his residence to a job site. When asked how often his work was located closer than the distance between Chadbourn, the closest city to Cerro Gordo, and Wilmington, Plaintiff responded, "Not often." In addition to driving to his assigned job site, Plaintiff would drive from his residence to Defendant-Employer's office in Wilmington approximately once per week to do paperwork on Friday mornings.

. . . .

19. Plaintiff's counsel responded [to the job offer] that because Plaintiff had not reached maximum medical improvement, he would be glad to try the Fleet Manager's Assistant position. However, he required that Defendant-Employer furnish a company truck upon his arrival for mandatory drug screening.

20. Defendant-Employer denied Plaintiff's demand for a company truck. Plaintiff's counsel was advised that Defendant-Employer had previously furnished Plaintiff a truck as a necessary part of his job; however, company trucks are not provided for office staff positions.

. . . .

22. Plaintiff's counsel reiterated the request for a company truck on September 5, 2008.

. . . .

24. . . . [Dr. Noojin] also opined that Plaintiff is physically capable of performing the drive between his residence and Defendant-Employer's office in Wilmington to perform the Fleet Manager's Assistant position.

None of these findings of fact are challenged by Plaintiff and are thus binding on appeal. These findings also demonstrate that the portion of finding of fact 34 "that Plaintiff was more concerned about whether he would be provided with a company truck to make the drive" was supported by competent evidence. Moreover, these findings indicate that,

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while distance is ordinarily a factor in determining the suitability of employment, the location of the job and distance of Plaintiff's residence therefrom was not the problem. Rather, the findings of fact indicate that Plaintiff's refusal of the fleet manager's assistant position was premised not on the commute but, rather, on Defendant's policy against providing office staff employees with a company vehicle.

In light of the foregoing, we hold that the Commission's conclusion that Plaintiff unjustifiably refused Defendant's multiple offers of a suitable fleet manager's assistant position is supported by the findings of fact, which are in turn supported by competent evidence of record.

II.

[2] In his second argument, Plaintiff contends that the Commission erred in finding that Plaintiff's expert did not offer an opinion regarding Plaintiff's earning capacity and in concluding that Plaintiff was not disabled.

"Disability" is defined as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9) (2009). The employee must prove that he is unable to earn the same wages that he had earned before his injury, either in the same or other employment, and that the diminished earning capacity is a result of the compensable injury, *see Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982), a burden which he may meet in one of four ways:

(1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Russell v. Lowes Product Distribution, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (internal citations omitted).

Here, Plaintiff contests the Commission's finding of fact 36, that Plaintiff's vocational case manager expert, Stephanie Yost, offered no opinion of Plaintiff's earning capacity. The Commission found "Ms. Yost

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performed 2 labor market surveys and concluded that Plaintiff was not employable in the common labor market.” In an effort to suggest that he met his burden under the third prong of the *Russell* analysis, Plaintiff argues that this *is* an opinion regarding his earning capacity: “he has none[,] given his present restrictions.” However, the Commission also noted that “[l]imited weight [was] given to the testimony of Ms. Yost,” indicating that her conclusion that Plaintiff was not employable at a light duty capacity was incredulous to the Commission. Plaintiff argues that this assessment was the only opinion regarding his earning capacity, but it is well-established that the Commission may accept or reject the testimony and opinions of any witness, even if that testimony is uncontradicted. See *Hassell v. Onslow Cty. Bd. of Educ.*, 362 N.C. 299, 306-07, 661 S.E.2d 709, 715 (2008) (stating that “[t]he Commission ‘may not wholly disregard competent evidence’; however, as the sole judge of witness credibility and the weight to be given to witness testimony, the Commission ‘may believe all or a part or none of any witness’s testimony,’ ” and “[t]he Commission is not required to accept the testimony of a witness, even if the testimony is uncontradicted,” nor must it “offer reasons for its credibility determinations”). Where the Commission is the exclusive judge of credibility and did indeed offer reasons for its determination as to Ms. Yost based on her self-contradictory testimony, it properly afforded little weight to her testimony. Furthermore, the Commission’s own finding that the fleet manager’s assistant position was suitable and, if accepted, would have earned Plaintiff his pre-injury weekly wage, is also evidence contradicting Ms. Yost’s opinion. Plaintiff acknowledges that no other evidence regarding his earning capacity was offered, and, as such, the Commission properly found that “Plaintiff has failed to establish that he is unable to earn his pre-injury average weekly wage in any employment as a result of his compensable injury.”

In light of the foregoing, the opinion and award of the Full Commission is affirmed.

Affirmed.

Judges BRYANT and STEELMAN concur.

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STATE OF NORTH CAROLINA v. LEWIS SZUCS

No. COA10-305

(Filed 2 November 2010)

1. Burglary and Unlawful Breaking or Entering— sufficient evidence

The trial court did not err in a felonious breaking or entering, felonious larceny, and felonious possession of stolen goods case by failing to dismiss the charges for insufficient evidence. There was sufficient evidence of all the elements of the offenses, including defendant's identity as one of the perpetrators and the possession element of the possession of stolen goods charge.

2. Identification of Defendants— plain error—testimony about defendant's mug shot

The trial court did not commit plain error in a felonious breaking or entering, felonious larceny, and felonious possession of stolen goods case by failing to exclude testimony from a police officer that he had found defendant's photograph in a database containing mug shots. While the comment was inadvisable, it was insignificant within the larger context of the officer's testimony.

3. Criminal Law— guilty plea—habitual felon—not invalid

The trial court did not err by accepting defendant's oral guilty plea to being an habitual felon. In accordance with *State v. Williams*, 133 N.C. App. 326, the trial court's failure to inform defendant of the maximum and minimum sentences did not invalidate defendant's plea.

4. Possession of Stolen Goods— felony larceny—felony possession of stolen goods—erroneous judgment for both charges

The trial court erred by entering judgment for both felony larceny and felony possession of stolen goods as the legislature did not intend to punish a defendant for possession of the same goods that he stole.

Appeal by defendant from judgment entered 19 August 2009 by Judge Calvin E. Murphy in Mecklenburg County Superior Court. Heard in the Court of Appeals 16 September 2010.

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[207 N.C. App. 694 (2010)]

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Victoria L. Voight, for the State.

William B. Gibson, for defendant-appellant.

JACKSON, Judge.

Lewis Szucs (“defendant”) appeals his 19 August 2009 convictions for felonious breaking or entering, felonious larceny, and felonious possession of stolen goods and his status as an habitual felon. For the reasons set forth below, we hold no error as to three issues and remand as to the fourth.

At approximately 4:15 p.m. on 4 April 2008, Linda Elizabeth Hurwitz (“Hurwitz”) arrived at her residence. She observed a red pickup truck (“the truck”) backed into the driveway and a man beside the truck talking on a cell phone. When the man saw her, he began to walk away. She saw a second man appear from behind her residence, carrying video game equipment. When the second man saw her, he dropped the items, ran behind the house, and headed into a wooded area. The truck was still running in the driveway. Hurwitz called the police.

Officer Derek K. Taylor (“Officer Taylor”) arrived and ran the tag for the truck. According to Department of Motor Vehicles records, defendant owned the truck. Hurwitz described the first man she saw as “tall and thin” and having “long dark hair in a ponytail.” She described the second man as white, with “a full face” and “longish” light hair. Hurwitz testified at trial that her memory was fuzzy.

Hurwitz and her husband identified a number of items that were taken from the house: a flat screen television, jewelry, a large quantity of loose change, a laptop, an X-box, a DVD player, and “kids stuff,” worth “in excess of \$5,000” in total. Officer Taylor found the Hurwitzes’ flat screen television in the truck along with other items that did not belong to them. In addition, there was video gaming equipment and a laptop on the lawn.

Officer Gina Cook (“Officer Cook”), a canine handler, arrived with her canine approximately twenty minutes after the initial call. The canine tracked a scent from the area where the second man had been seen jumping over the fence. The scent was lost on Thermal Road. Officer Cook testified that the track led her down a muddy embankment which contained fresh slide marks and muddy footprints.

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Sergeant Juan Garrido (“Sergeant Garrido”) responded to the scene. He testified that, according to the witness descriptions, one suspect wore a burgundy shirt and one wore a gray shirt. After defendant was identified as the owner of the truck, Sergeant Garrido looked through a database of “mug shots” to find defendant’s photograph. In driving through the neighborhood, Sergeant Garrido observed defendant walking on Thermal Road. Defendant wore a “reddish” shirt, his clothing was wet, and his shoes and pants were muddy. Defendant had in his possession a Leatherman tool—containing a screwdriver, knife, file, ruler, and can opener—and a large quantity of change. Police previously had apprehended another man—later identified as Daniel Greenway (“Greenway”), defendant’s roommate and known associate—and had found an electronic device on him.

On 19 August 2009, a jury found defendant guilty of felonious breaking or entering, felonious possession of stolen goods, and felonious larceny. Defendant admitted his status as an habitual felon. The trial court informed defendant of his right to remain silent; determined that he understood the nature of the charge; informed him that he had a right to plead not guilty; informed him that, by his plea, he waived his right to trial by jury and his right to be confronted by the witnesses against him; and determined that defendant was satisfied with his counsel.

The trial court consolidated the felonious larceny and felonious possession of stolen property into the felonious breaking or entering conviction and sentenced defendant in the mitigated range to a minimum of 100 months and a maximum of 129 months. Defendant appeals.

[1] Defendant first argues that the trial court erred in denying his motions to dismiss, because the State failed to present sufficient evidence as to each element of the offenses charged. We disagree.

“Taking the evidence in the light most favorable to the State, if the record here discloses substantial evidence of all material elements constituting the offense for which the accused was tried, then this [C]ourt must affirm the trial court’s ruling on the motion.” *State v. Stephens*, 244 N.C. 380, 383, 93 S.E.2d 431, 433 (1956).¹ The task is to “determine only whether there is substantial evidence of each essential element of

1. The motion in *Stephens* is a motion for nonsuit. A motion to dismiss is identical to a motion for nonsuit in that both test the sufficiency of the evidence to sustain a conviction. “Therefore, controlling cases dealing with the sufficiency of evidence to withstand a motion for judgment as in the case of nonsuit are equally applicable to the sufficiency of the evidence to withstand a motion for dismissal pursuant to G.S. 15A-1227.” *State v. Smith*, 40 N.C. App. 72, 77, 252 S.E.2d 535, 538-39 (1979).

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the offense charged and of the defendant[s] being the perpetrator of the offense.” *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996) (citing *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991)). “ ‘Substantial evidence’ is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion[.]” *State v. Garcia*, 358 N.C. 382, 412, 597 S.E.2d 724, 746 (2004) (internal citations omitted), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005). “In this determination, all evidence is considered in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence.” *State v. Abshire*, 363 N.C. 322, 328, 677 S.E.2d 444, 449 (2009) (citation and internal quotation marks omitted).

Defendant challenges the State’s evidence as to his identity as one of the perpetrators of all three offenses—breaking or entering, larceny, and possession of stolen goods. He also argues that the State presented insufficient evidence as to his possessing any of the stolen goods. We first address the identity question and then the possession element of the possession of stolen goods charge.

The State concedes that it did not present direct evidence of defendant’s identity as one of the perpetrators of the charged offenses. Nonetheless, circumstantial evidence is admissible to prove identity, *see State v. McNeil*, 359 N.C. 800, 804, 617 S.E.2d 271, 274 (2005) (“[I]f there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.”) (citation and internal quotation marks omitted), and the State presented sufficient circumstantial evidence to withstand defendant’s motions to dismiss.

Here, the State presented evidence that (1) even though defendant did not know the family, his truck was found parked in the Hurwitzes’ driveway with the engine running; (2) Hurwitz observed a man matching defendant’s general description holding electronic equipment that subsequently was determined to have been stolen; (3) that man dropped the electronic equipment and jumped over a fence; (4) a police dog tracked the man’s scent through muddy terrain behind the house and lost the trail near Thermal Road; (5) the canine officer observed “slide marks” in the mud that were “very fresh[;]” (6) defendant subsequently was found on Thermal Road, and his pants and shoes were muddy; (7) defendant had a Leatherman tool in his possession, which could have been used to pry open the side door of the Hurwitzes’

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house; (8) defendant also had approximately \$30.00 in loose change, which could have been the change taken from the Hurwitz residence; and (9) when police apprehended Greenway, defendant's roommate and known associate, he had an electronic device in his possession. Accordingly, viewed in the light most favorable to the State, the evidence was sufficient for a reasonable juror to conclude that defendant was one of the perpetrators of the crimes charged.

The State also presented substantial evidence as to defendant's possession of items stolen from the Hurwitz residence. The elements of possession of stolen goods are: “(1) possession of personal property, (2) which has been stolen, (3) the possessor[’s] knowing or having reasonable grounds to believe the property was stolen, and (4) the possessor[’s] acting with a dishonest purpose.” *State v. Bailey*, 157 N.C. App. 80, 86, 577 S.E.2d 683, 688 (2003) (citation omitted). *See* N.C. Gen. Stat. § 14-71.1 (2007).

We previously have held that

possession [of stolen goods] . . . may be either actual or constructive. Constructive possession exists when the defendant, while not having actual possession [of the goods], . . . has the intent and capability to maintain control and dominion over the[m].

State v. Phillips, 172 N.C. App. 143, 146, 615 S.E.2d 880, 882-83 (2005) (internal citations and quotation marks omitted) (alterations in original).

In the case *sub judice*, the State's evidence tended to show that (1) defendant's truck was parked at the Hurwitz residence with the engine running; (2) items found inside defendant's truck included electronic equipment belonging to the Hurwitzes; (3) a man fitting defendant's general description was seen holding items later identified as stolen; (4) items reported as missing included electronic equipment and a large quantity of loose change; (5) the police dog's handler observed evidence that someone recently had been in the muddy area behind the residence; (6) the side door of the residence showed pry marks; (7) defendant was found wearing wet clothing with mud on his pants and shoes; and (8) defendant had in his possession a Leatherman tool and a large quantity of loose change. Viewed in the light most favorable to the State, we hold that a reasonable juror could conclude that defendant possessed goods stolen from the Hurwitz residence—either as the person standing in the yard holding electronic equipment before jumping the fence, through constructive possession of the items in his truck, or through actual possession of approximately \$30.00 in loose change.

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Furthermore, defendant bases a substantial portion of his argument upon Greenway's actual possession of the Hurwitzes' electronic device and contends that the item "cannot properly be attributed to [defendant]" because the jury instruction as to acting in concert related only to the breaking or entering and larceny offenses. Defendant's argument is not persuasive.

First, as discussed *supra*, the State's evidence of defendant's possession of stolen goods is not limited to the item discovered in Greenway's possession. Second, even if the State's case relied heavily upon this piece of evidence, the trial court's instructions as to acting in concert encompassed the possession of stolen goods charge in addition to the breaking or entering and larceny charges.

The trial court instructed the jury that

[i]f two or more persons join in a common purpose to commit breaking and entering and larceny, each of them, if actually or constructively present, is not only guilty of that crime or those crimes if the other person commits the crime, *but is also guilty of any other crime committed by the other person in pursuance of the common purpose to commit breaking and entering and larceny, or as a natural or probable consequence thereof.*

(Emphasis added). Because possession of stolen goods is a "natural [and] probable consequence" of larceny and breaking or entering, the trial court's instruction as to acting in concert covered all three offenses. Therefore, the evidence that police found in Greenway's possession properly could be attributed to defendant.

[2] Next, defendant argues that the trial court committed plain error by failing to exclude testimony by Sergeant Garrido that he determined what defendant looked like by viewing "mug shots" because that testimony improperly suggested to the jury that defendant had been arrested previously and charged with crimes. We disagree.

Because defendant did not object to the evidence at the time it was offered at trial, we review this issue only for plain error. *State v. Allen*, 360 N.C. 297, 310, 626 S.E.2d 271, 282 (citing *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)), *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006). "The plain error rule applies only in truly exceptional cases. Before deciding that an error by the trial court amounts to 'plain error,' the appellate court must be convinced that absent the error the jury probably would have reached a different verdict." *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986) (citing *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378-79 (1983)).

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[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *U.S. v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)) (internal quotation marks omitted) (alterations and emphasis in original).

Our courts previously have addressed whether admission of certain testimony as to a defendant's background rises to the level of plain error. In *State v. Cole*, an officer testified that he knew the defendant, had been to the defendant's home, and knew the defendant's brother because the officer had arrested the brother multiple times. 343 N.C. 399, 419, 471 S.E.2d 362, 372 (1996). The Court held that admission of such testimony did not constitute plain error. *Id.* at 420, 471 S.E.2d at 372. Similarly, in *State v. Bellamy*, an officer was asked on cross-examination whether the defendant may have been "under the influence" when he was arrested. 159 N.C. App. 143, 145-46, 582 S.E.2d 663, 666, *cert. denied*, 357 N.C. 579, 589 S.E.2d 130 (2003). The officer "responded that 'it was possible because I know his past, but that night I don't know for sure if he was or was not.'" *Id.* at 146, 582 S.E.2d at 666. This Court held that admission of such testimony did not rise to the level of plain error. *Id.* at 147, 582 S.E.2d at 667.

Here, Sergeant Garrido testified that he found defendant's photo in a database containing mug shots. Considering the State's other evidence, we are not convinced that admission of Sergeant Garrido's testimony constituted a fundamental error or probably led the jury to reach a different result. This comment, while inadvisable, was insignificant within the larger context of Sergeant Garrido's testimony and no further details of defendant's criminal history were elicited or disclosed. Accordingly, we hold that the trial court did not commit plain error by allowing such testimony.

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[3] Defendant's third argument is that the trial court committed reversible error by accepting defendant's oral guilty plea to being an habitual felon. We disagree.

North Carolina General Statutes, section 15A-1022(a)(6) prohibits a superior court from accepting a plea of guilty without first informing the defendant of the maximum possible and mandatory minimum sentences. N.C. Gen. Stat. § 15A-1022(a)(6) (2007). North Carolina General Statutes, section 15A-1446(d)(16) permits appellate review for errors occurring in the entry of the plea "even though no objection, exception or motion has been made in the trial division." N.C. Gen. Stat. § 15A-1446(d)(16) (2007).

We have held that North Carolina General Statutes, section 15A-1022(a) "is based upon constitutional principles enunciated in *Boykin v. Alabama*, 395 U.S. 238, 23 L. Ed. 2d 274 (1969) and its progeny." *State v. Bozeman*, 115 N.C. App. 658, 661, 446 S.E.2d 140, 142 (1994) (citation omitted). For constitutional errors, "[t]he burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C. Gen. Stat. § 15A-1443(b) (2007).

"Under *Boykin*, due process, as established by the Fourteenth Amendment to the United States Constitution, requires that a defendant's guilty plea be made voluntarily, intelligently and understandingly." *Id.* at 661, 446 S.E. 2d at 142 (citing *Boykin*, 395 U.S. at 244, 23 L. Ed. 2d at 280). "Although a defendant need not be informed of all possible indirect and collateral consequences, the plea nonetheless must be entered by one fully aware of the *direct consequences*, including the actual value of any commitments made to him by the court . . ." *Id.* (citation and internal quotation marks omitted) (emphasis in original). Even though "we are compelled to conclude that a mandatory minimum sentence constitutes a 'direct consequence' of a guilty plea,]" *id.* at 661, 446 S.E. 2d at 142-43, failure to inform a defendant of the minimum sentence attached to his guilty plea does not invalidate his plea automatically, *State v. McNeill*, 158 N.C. App. 96, 103, 580 S.E. 2d 27, 31 (2003) ("Even when a violation [of North Carolina General Statutes, section 15A-1022] occurs, there must be prejudice before a plea will be set aside.") (citing *Bozeman*, 115 N.C. App. at 660, 446 S.E. 2d at 142).

When reviewing the validity of a defendant's plea, our courts have declined "to adopt a technical, ritualistic approach" to determining whether or not the plea was voluntary and intelligent. *State v. Richardson*, 61 N.C. App. 284, 289, 300 S.E. 2d 826, 829 (1983).

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Instead, we review the “totality of the circumstances and determine whether non-compliance with the statute either affected defendant’s decision to plead or undermined the plea’s validity.” *State v. Hendricks*, 138 N.C. App. 668, 670, 531 S.E.2d 896, 898 (2000) (citing *State v. Williams*, 65 N.C. App. 472, 481, 310 S.E.2d 83, 88 (1983)).

In the instant case, the State indicted defendant as an habitual felon pursuant to North Carolina General Statutes, section 14-7.1. Defendant’s counsel indicated that defendant wished to admit his habitual felon status. The trial court advised defendant:

The State has indicted you as being an habitual felon. A habitual felon is a status offense that authorizes a much higher sentence to be imposed than if you were simply convicted of the charges of felonious house breaking, felonious larceny and felonious possession of stolen goods.

Each one of those offenses is a Class H felony. However, if you’re found to be an habitual felon, then of course the punishment level is escalated to a Class C punishment.

Defendant indicated that he understood and that he voluntarily admitted his status. In *State v. Williams*, the trial court had inquired as to whether the defendant understood that she would be sentenced as a Class C felon based upon her habitual felon status. 133 N.C. App. 326, 331, 515 S.E.2d 80, 83 (1999). The defendant had admitted that she had committed the felonies in the indictment and was proceeding voluntarily. *Id.* On appeal, this Court held that the defendant was aware of the direct consequences of her guilty plea. *Id.* “[T]he trial court’s failure to inform [the defendant] of the maximum or minimum sentence for a Class C offense did not invalidate her guilty plea.” *Id.* at 330, 515 S.E.2d at 83. In accordance with *Williams*, we hold that, in the case *sub judice*, the failure of the trial court to inform defendant of the maximum and minimum sentences did not invalidate his plea.

[4] Defendant’s final contention is that the trial court committed reversible error by entering judgment for both felony larceny and felony possession of stolen goods. The State concedes that defendant is correct, and we agree.

Our Supreme Court has held that the legislature did not intend to punish a defendant for possession of the same goods that he stole. *State v. Perry*, 305 N.C. 225, 236, 287 S.E.2d 810, 817 (1982), *overruled on other grounds by State v. Mumford*, 364 N.C. 394, 402, 699 S.E.2d

KINGSTON v. LYON CONSTR., INC.

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911, 916 (2010). “Since the defendant can only be convicted of either the larceny or the possession of stolen property, judgment must be arrested in one of the two cases.” *State v. Dow*, 70 N.C. App. 82, 87, 318 S.E.2d 883, 887 (1984). The fact that the trial court consolidated the verdicts in larceny and possession of stolen goods for sentencing does not preclude arresting judgment. *Id.*

Here, the indictments charged defendant with felonious larceny and felonious possession of stolen goods based upon the same property. Defendant was convicted of both of these offenses. In accordance with *Dow*, we arrest defendant’s conviction for felonious possession of stolen goods in file 08-CRS-216271 and remand for resentencing in accordance with this opinion.

No error in part; Remand in part.

Judges ELMORE and STEPHENS concur.

CARL B. KINGSTON, PETITIONER v. LYON CONSTRUCTION, INC., AND PMA
INSURANCE GROUP, RESPONDENTS

No. COA10-193

(Filed 2 November 2010)

1. Workers’ Compensation— lien against settlement proceedings—subject matter jurisdiction

The trial court did not lack subject matter jurisdiction to rule on a motion for determination of a workers’ compensation lien for third-party settlements where only some of the third-party claims had been settled. A final settlement agreement between an employee and a third party was necessary to invoke the jurisdiction conferred by N.C.G.S. § 97-10.2(j); here, the settlements were final and enforceable under contract principles and have been performed, binding the parties. The possibility of future settlements has no effect on the enforceability of the settlements already reached.

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[207 N.C. App. 703 (2010)]

2. Civil Procedure— newly discovered evidence—denial of motion to consider

The trial court did not abuse its discretion by denying a motion to introduce newly discovered evidence under N.C.G.S. § 1A-1, Rule 60(b)(2) in a third-party tort action that had been settled and was awaiting determination of the employer's workers' compensation lien. Respondents filed the motion after the hearing but before a written order had been issued, so that they were attempting to put new evidence before the court in the rendering of the final order rather than seeking relief from an order. Even if the motion had been properly denominated, the trial court did not abuse its discretion in denying the request.

3. Workers' Compensation— lien against third-party settlement—reduced to zero—no abuse of discretion

The trial court did not err by reducing to zero workers' compensation liens by the employer against third-party tortfeasors where the findings evidenced the trial court's thorough consideration of the necessary statutory factors and amply supported its conclusion. The possibility of future settlements did not impair the trial court's consideration of the net recovery from the present settlements or impair its ability to balance the equities in making its determination.

Appeal by Respondents from orders entered 14 September 2009 by Judge Edwin G. Wilson, Jr. in Superior Court, Rockingham County. Heard in the Court of Appeals 31 August 2010.

Wallace and Graham, P.A., by Michael B. Pross, for Petitioner.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Rebecca L. Zoller and M. Duane Jones, for Respondents.

STEPHENS, Judge.

I. Factual Background and Procedural History

Petitioner Carl Benton Kingston was exposed to asbestos while employed by Lyon Construction, Inc. ("Lyon Construction") from 1994 until 2000. In 2006, Petitioner was diagnosed with the asbestos-related disease pleural mesothelioma. On 24 October 2006, Petitioner filed a workers' compensation claim against Lyon Construction and its workers' compensation insurance carrier, PMA Insurance Group

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(collectively, “Respondents”). Respondents filed an Industrial Commission Form 61 denying the claim on 1 December 2006. The matter was heard by Deputy Commissioner George T. Glenn II on 28 January 2008. On 26 June 2008, Deputy Commissioner Glenn entered an Opinion and Award in favor of Petitioner awarding indemnity compensation in the amount of \$730.00 per week and related medical benefits. The Full Commission heard Respondents’ appeal on 10 December 2008. In an Opinion and Award entered 3 February 2009, the Full Commission affirmed Deputy Commissioner Glenn’s decision, ordering Respondents to “pay to [Petitioner] total disability compensation at the weekly rate of \$730.00 from June[] 13, 2006, and continuing until further order of the Commission[.]”

During the pendency of the proceedings in Petitioner’s workers’ compensation claim, Petitioner pursued tort claims against a number of manufacturers of asbestos products. Petitioner’s claims against several of the manufacturers were resolved through settlement. On 5 June 2009, Petitioner filed a motion in Rockingham County Superior Court for determination of Respondents’ lien on those settlement funds pursuant to N.C. Gen. Stat. § 97-10.2(j). The motion alleged that Petitioner “filed or expects to file a lawsuit against various third parties that manufactured asbestos-containing products” and that Respondents asserted a lien against any recovery Petitioner obtained. Petitioner sought reduction or elimination of Respondents’ potential lien due to the severity of Petitioner’s illness and the inability of the third parties, several of whom were in bankruptcy, to adequately compensate Petitioner for his injury. When the motion was heard on 20 July 2009, documents reflecting Petitioner’s settlements with third parties were admitted into evidence under seal.

On 30 July 2009, Respondents filed a motion to introduce newly discovered evidence pursuant to Rule 60(b)(2) of the North Carolina Rules of Civil Procedure. Respondents alleged that a newly discovered document concerning Petitioner’s action against third parties conflicted with evidence Petitioner presented at the hearing.¹

On 14 September 2009, the trial court entered separate written orders (1) denying Respondents’ motion to introduce newly discov-

1. While Respondents’ motion sought to admit various filings in the third-party action, Respondents’ argument on appeal pertains solely to a letter sent on 25 February 2009 by Petitioner’s counsel in the third-party action stating that the matter had been “resolved with all defendants[,]” which Respondents argue was inconsistent with Petitioner’s representation at the hearing that settlements had been reached with only some of the third parties named as defendants in the action.

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ered evidence and (2) reducing Respondents' lien to zero. Respondents filed notice of appeal from the trial court's orders on 21 October 2009.²

*II. Discussion**A. Jurisdiction of Superior Court*

[1] Respondents first contend that the trial court lacked subject matter jurisdiction to rule on Petitioner's motion for determination of their workers' compensation lien pursuant to N.C. Gen. Stat. § 97-10.2(j). Specifically, Respondents argue that the trial court lacked jurisdiction to determine the lien because Petitioner's settlement of claims against some third parties without full resolution of the entire action is insufficient to trigger jurisdiction under section 97-10.2(j). We disagree.

N.C. Gen. Stat. § 97-10.2 allows an injured employee to pursue a cause of action against a "third party" who may be liable for the employee's injury without affecting the employee's right to compensation under the Workers' Compensation Act. N.C. Gen. Stat. § 97-10.2(a) (2009). The statute grants the employee the right to pursue any claim against a third party, including the right to settle with a third party and give a valid release of all claims related to the employee's injury. N.C. Gen. Stat. § 97-10.2(b) and (c) (2009). Section 97-10.2 further provides:

(h) In any proceeding against or settlement with the third party, every party to the claim for compensation shall have a lien to the extent of his interest [pursuant to an Industrial Commission award] upon any payment made by the third party by reason of such injury or death, whether paid in settlement . . . or otherwise and such lien may be enforced against any person receiving such funds. . . .

. . . .

(j) Notwithstanding any other subsection in this section, in the event that a judgment is obtained by the employee in an action against a third party, or in the event that a *settlement has been agreed upon* by the employee and the third party, either party may apply to the resident superior court judge of the county in which the cause of action arose or where the injured employee resides, or to a presiding judge of either district, to determine the

2. According to the notice of appeal, Respondents received the trial court's orders on 25 September 2009.

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subrogation amount. After notice to the employer and the insurance carrier, after an opportunity to be heard by all interested parties, and with or without the consent of the employer, the judge shall determine, in his discretion, the amount, if any, of the employer's lien, whether based on accrued or prospective workers' compensation benefits, and the amount of cost of the third-party litigation to be shared between the employee and employer.

N.C. Gen. Stat. § 97-10.2 (2009) (emphasis added). This Court's determination of whether a trial court has subject matter jurisdiction is a question of law that is reviewed on appeal *de novo*. *Ales v. T.A. Loving Co.*, 163 N.C. App. 350, 352, 593 S.E.2d 453, 455 (2004).

In the absence of a judgment against a third party, a final settlement agreement between an employee and a third party is necessary to invoke the jurisdiction conferred by section 97-10.2(j). *Id.* at 353, 593 S.E.2d at 455. To be considered final, the settlement agreement must be enforceable under principles of contract law. *Id.* at 352-53, 593 S.E.2d at 455. Thus, "N.C. Gen. Stat. § 97-10.2(j) . . . permit[s] the superior court to adjust the amount of a subrogation lien if the agreement between the parties has been finalized so that only performance of the agreement is necessary to bind the parties." *Id.* at 353, 593 S.E.2d at 455.

In *Ales*, a settlement agreement between an employee and a third party that was contingent upon the elimination of any lien asserted by the employer was held insufficient to give the trial court jurisdiction because "[a]n agreement containing a condition precedent which must be fulfilled before either party is bound to the contract terms does not give the trial court jurisdiction under N.C. Gen. Stat. § 97-10.2(j)." *Id.*

It is uncontested that the settlement agreements in the present case have already been performed. Thus, the settlement agreements are not subject to any conditions precedent and have already bound the parties. Accordingly, we conclude that the settlement agreements reached between Petitioner and third parties are sufficient to give the trial court jurisdiction under section 97-10.2(j).

Respondents argue further, however, that Petitioner's settlements are "contingent" because Petitioner may recover from additional third parties in the future. We disagree. The possibility of future settlements has no effect on the enforceability of the settlement agreements Petitioner has already reached with several third parties.

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Moreover, if Petitioner receives additional settlements or judgments from other third parties in the future, Respondents may assert a lien against those funds and the superior court may determine such lien. See N.C. Gen. Stat. § 97-10.2(h) and (j).

Citing *Hieb v. Lowery*, 344 N.C. 403, 474 S.E.2d 323 (1996), Respondents further argue that this Court should apply the plain meaning of the term “settlement” as used in N.C. Gen. Stat. § 97-10.2(j) and find that such plain meaning requires settlement between all parties in multi-party litigation. We decline to do so. In *Hieb*, our Supreme Court accorded plain meaning to the term “judgment,” the other type of recovery from a third party that gives the superior court jurisdiction to determine an employer’s lien under N.C. Gen. Stat. § 97-10.2(j). *Id.* at 410, 474 S.E.2d at 327. Respondents’ reliance on *Hieb* is misplaced because the Court in *Hieb* considered only the meaning of the term “judgment” and not the meaning of the term at issue here, “settlement.” This Court established the meaning of the term “settlement” as used in section 97-10.2(j) in *Ales*. As discussed *supra*, Petitioner’s settlements with third parties meet the definition adopted in *Ales*, as they are not only final and enforceable under contract principles, but also have been performed.

Accordingly, the trial court did not lack subject matter jurisdiction to rule on Petitioner’s motion for determination of workers’ compensation lien pursuant to N.C. Gen. Stat. § 97-10.2(j).

B. Motion to Introduce Newly Discovered Evidence

[2] Respondents next assert that the trial court abused its discretion in denying Respondents’ motion to introduce newly discovered evidence pursuant to Rule 60(b)(2) of the North Carolina Rules of Civil Procedure. Specifically, Respondents contend that a document related to Petitioner’s third-party action, which Respondents did not discover until after the 20 July 2009 hearing, qualified as newly discovered evidence under Rule 60(b)(2) and, thus, should have been admitted into evidence after completion of the hearing but prior to a final decision. We disagree.

Rule 60(b) provides in pertinent part:

On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for . . . [n]ewly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)[.]

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N.C. Gen. Stat. § 1A-1, Rule 60(b) (2009). Under Rule 59(b), a motion for a new trial must be served within 10 days after entry of judgment. N.C. Gen. Stat. § 1A-1, Rule 59(b) (2009).

Denial of a Rule 60(b) motion is reviewed under an abuse of discretion standard. *Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006). Accordingly, the trial court's decision "is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

"To proceed under Rule 60(b) . . . requires an initial determination of whether a [procedural act] constitutes a 'judgment, order[,] or proceeding.'" *Carter v. Clowers*, 102 N.C. App. 247, 252, 401 S.E.2d 662, 665 (1991). Rule 60(b) "has no application to *interlocutory* judgments, orders, or proceedings of the trial court. It only applies, by its express terms, to *final* judgments." *Sink v. Easter*, 288 N.C. 183, 196, 217 S.E.2d 532, 540 (1975). Respondents filed their motion to introduce newly discovered evidence after the hearing on Petitioner's motion to determine Respondents' workers' compensation lien, but before any written order had been issued on Petitioner's motion.³ Because a hearing alone, without a written order, is not a final judgment or order, Respondents' motion to introduce newly discovered evidence could not, as a matter of law, have been proper under Rule 60(b). *See id.* at 196, 217 S.E.2d at 541.

Moreover, Respondents did not seek relief from a final judgment or order, but, rather, attempted to put new evidence before the trial court for its consideration in rendering its final judgment or order. Rule 60(b) does not contemplate this kind of relief.

That Respondents incorrectly denominated their motion under Rule 60(b), however, is not determinative of the issues raised on this appeal. Up to the time of entry of the trial court's order determining the lien issues, the matter remained open, and Respondents were clearly within well-recognized rights to move the court to reopen the hearing and receive additional evidence. *See Rea v. Hardware Mut. Casualty Co.*, 15 N.C. App. 620, 190 S.E.2d 708 (1972) (trial court did not abuse its discretion in denying plaintiff's motion to reopen the case, amend its pleadings, and present further evidence after the evi-

3. While Respondents state that Judge Wilson issued an oral ruling during a telephone conference on 21 July 2009, the rendering of an oral ruling does not constitute the entry of a final judgment or order. *Kirby Bldg. Sys., Inc. v. McNiel*, 327 N.C. 234, 393 S.E.2d 827 (1990).

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dence had been presented but before the court had made its findings of fact and conclusions of law and before judgment was entered). Whether the court chose to do so was also well within the court's broad discretion such that, had Respondents simply filed a motion to reopen the hearing and present further evidence, we nevertheless would conclude that the trial court did not abuse its discretion in denying the request.

On appeal, Respondents assert that a letter dated 25 February 2009 sent by Plaintiff's counsel in the third-party action stating that the matter had been "resolved with all defendants" was inconsistent with Petitioner's representation at the hearing that settlements had been reached with only several of the third parties named as defendants in the action. In opposition to Respondents' motion, Petitioner introduced evidence that the cases against the third parties who had not settled with Petitioner had been voluntarily dismissed. Therefore, while the matter had been "resolved with all defendants[,] there were no settlements with third parties in addition to those that were presented to the trial court which would have been relevant to the determination of the workers' compensation lien under N.C. Gen. Stat. § 97-10.2(j). Based upon our consideration of the parties' arguments and our review of the record, we conclude that the trial court did not abuse its discretion in denying Respondents' motion to introduce newly discovered evidence.

C. Determination of the Lien

[3] Respondents finally contend that the trial court abused its discretion in reducing Respondents' lien to zero. Specifically, Respondents assert that the trial court failed to appropriately consider "the net recovery to [Petitioner]" as required by N.C. Gen. Stat. § 97-10.2(j). We disagree.

Section 97-10.2(j) provides that in determining the amount of the lien, [t]he judge shall consider the anticipated amount of prospective compensation the employer or workers' compensation carrier is likely to pay to the employee in the future, the net recovery to plaintiff, the likelihood of the plaintiff prevailing at trial or on appeal, the need for finality in the litigation, and any other factors the court deems just and reasonable[.]

N.C. Gen. Stat. § 97-10.2(j). "[I]t is clear from the use of the words 'shall' and 'and' in subsection (j), that the trial court must, at a minimum, consider the factors that are expressly listed in the statute." *Estate of*

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Bullock v. C.C. Mangum Co., 188 N.C. App. 518, 526, 655 S.E.2d 869, 874 (2008).

Section 97-10.2(j) grants the trial court discretion to determine the amount of a workers' compensation lien and the trial court's decision is reviewed on appeal under an abuse of discretion standard. *In re Biddix*, 138 N.C. App. 500, 504, 530 S.E.2d 70, 72, *disc. review denied*, 352 N.C. 674, 545 S.E.2d 418 (2000). In exercising its discretion, "the trial court is to make a reasoned choice, a judicial value judgment, which is factually supported . . . [by] findings of fact and conclusions of law sufficient to provide for meaningful appellate review." *Id.* (alteration in original) (quotation marks and citation omitted).

In its order reducing Respondents' lien to zero, the trial court made the following findings:

The total amount of the [disability] benefits[, as] spelled out in the computations presented to this court together with the Order of the Industrial Commission for past disability benefits and project[ed] forward based upon Dr. Granfortuna's testimony of a one[-] to two[-]year life expectancy[,] is \$127,567.50, as well as medical expenses. . . .

Therefore, in accordance with the first and second factors under N.C. Gen. Stat. § 97-10.2(j), [Petitioner] will receive approximately \$127,567.50 in workers' compensation benefits.

The next factor is the net recovery to [Petitioner]. In terms of the third party recoveries, [Petitioner's] counsel has presented to this court various settlement documents and a summary document listing [Petitioner's] recovery. [Petitioner] has received, in net recovery approximately \$289,669.49, after attorney fees and costs.

The question then becomes how much, if any, of this amount is available for the employer's lien. . . . The [c]ourt must determine whether [Petitioner] has been adequately compensated by the third party recoveries and has been "made whole[.]"

[Petitioner] filed lawsuits against various third parties that manufactured asbestos-containing products to which he was exposed. Various manufacturers have filed for bankruptcy protection. As evidenced in the settlement documents produced to this [c]ourt, the various third party claims were significantly reduced in value as a result of the bankruptcy.

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There are numerous defendants in the third party litigation. This case has not gone to trial and the vast majority of the cases have settled. The money that has been received is all from settlements. Settlements are, by their very nature, compromises wherein defendants have paid less than full value to resolve the claim. . . .

. . . .

There is a need for finality in this litigation. [Petitioner] suffers from a fatal, incurable form of cancer. His workers' compensation claim has been pending for over three years and [Petitioner] is totally disabled.

As to the third party claims, the likelihood of success would appear to be favorable except for the bankruptcies. . . .

. . . If Lyon Construction, Inc. obtains a lien for subrogation rights to the proceeds from the third party settlements, Petitioner will be forced to pay back a large, if not all, portion of the already insufficient workers' compensation benefits, causing him great financial hardship.

IT IS THEREFORE ORDERED that in regard to the \$289,669.49 received by Petitioner in third party settlements, the employer's lien against those settlements is reduced to zero.

These findings of fact evidence the trial court's thorough consideration of the necessary statutory factors and amply support its conclusion that Respondents' lien on Petitioner's settlements should be reduced to zero.

Nonetheless, Respondents argue that the trial court could not have accurately considered the net recovery to Petitioner because Petitioner's action against third parties was ongoing and could result in future settlements. We disagree.

The possibility of future settlements did not impair the trial court's consideration of the net recovery from the present settlements or impair its ability to balance the equities in making its determination. As discussed *supra*, were Petitioner to recover additional funds in the future, Respondents could assert a lien upon such funds pursuant to N.C. Gen. Stat. § 97-10.2(h). That lien would be determined pursuant to N.C. Gen. Stat. § 97-10.2(j), at which time the court could consider the settlements at issue in the present case in determining the net recovery to Petitioner. The potential for such future

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determination did not, however, prevent the trial court here from appropriately considering the factors listed in section 97-10.2(j) in exercising its discretion to reduce Respondents' lien to zero.

Accordingly, we conclude that the trial court did not abuse its discretion in reducing Respondents' lien to zero.

For the foregoing reasons, the trial court's orders are

AFFIRMED.

Judges ROBERT C. HUNTER and ROBERT N. HUNTER, JR. concur.

ESTATE OF LAUREN MEANS BY KAREN MEANS, CO-ADMINISTRATRIX AND
MICHAEL MEANS, CO-ADMINISTRATOR, PLAINTIFFS V. SCOTT ELECTRIC CO.
INC., DEFENDANT

No. COA09-779

(Filed 2 November 2010)

1. Pleadings— previous lawsuit—judgment on pleadings—collateral estoppel—res judicata

The trial court did not err in a negligence suit by considering pleadings filed in a previous lawsuit concerning the same parties and subject matter in determining whether to grant defendant's Rule 12(c) motion on the basis of collateral or judicial estoppel. Moreover, even if the trial court had erred by considering the pleadings in the prior action, the proper remedy would have been to review the ruling under a Rule 56 summary judgment standard.

2. Collateral Estoppel and Res Judicata— prior lawsuit—dismissed without prejudice—no final judgment on the merits

The trial court erred in granting defendant's motion for judgment on the pleadings in a negligence action on the basis of collateral estoppel. The previous lawsuit concerning the same parties and subject matter was dismissed without prejudice and did not result in a final judgment on the merits.

3. Estoppel— judicial estoppel—positions not factually inconsistent

The trial court erred in granting defendant's motion for judgment on the pleadings in a negligence action on the basis of judi-

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cial estoppel. Plaintiffs did not take positions in a previous lawsuit and the present lawsuit that were factually inconsistent so the doctrine of judicial estoppel did not apply.

Appeal by plaintiffs from order entered 10 November 2008 by Judge W. Allen Cobb, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 12 January 2010.

Alan Toll and Associates, PLLC, by Alan E. Toll, Samuel B. Potter, and Kathryn Roebuck, and Chleborowicz & Theriault, LLP, by Christopher M. Theriault, for plaintiff-appellant.

Cranfill Sumner & Hartzog LLP, by Colleen N. Shea and Norwood P. Blanchard, III, for defendant-appellee.

STEELMAN, Judge.

The trial court did not err by considering pleadings filed in a previous lawsuit concerning the same parties and subject matter in determining whether to grant a Rule 12(c) motion on the basis of collateral or judicial estoppel. Where the earlier lawsuit did not result in a final judgment on the merits, collateral estoppel was inapplicable. Where plaintiffs did not assert factually inconsistent positions in the previous lawsuit, judicial estoppel was also inapplicable. The trial court committed reversible error by granting defendant's Rule 12(c) motion for judgment on the pleadings.

I. Factual and Procedural Background

This action arises from an incident in 2006 that occurred in a newly built residential condominium owned by Coastal Estates, Inc. (Coastal Estates) located in Carolina Beach. Ocean Haven Phase 2 Unit Owners Association, Inc. (Ocean Haven) was the homeowners' association for the condominium. Otto Pridgen, III (Pridgen) was the president of Coastal Estates and was a managing member of Ocean Haven. In April 2006, Scott Electric Company, Inc. (Scott) was hired to install an "Inclinor" elevator in the condominium. Installation was completed in late June. The elevator was connected to electrical service, which allowed the elevator to be operated without restriction. The New Hanover County building inspector had issued a certificate of occupancy for the condominium, but had not inspected the elevator. As such, the elevator should not have been connected to electrical service.

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On 23 July 2006, Lauren Means (Lauren), a ten-year-old minor child, attended a birthday party hosted by Pridgen at the condominium. At approximately 8:00 p.m., Lauren entered the elevator. The elevator subsequently got stuck between floors with Lauren trapped between the elevator cab and the shaft wall. Lauren suffered “traumatic and substantial crushing of her head, chest and shoulders which caused slow asphyxiation and eventual death due to crushing trauma, inability to breathe, and loss of blood and bodily fluids.”

On 25 January 2007, Karen and Michael Means (plaintiffs), on behalf of the estate of Lauren, filed an amended complaint against Pridgen, Coastal Estates, M. Garrett, Inc.¹, Ocean Haven, and Scott and alleged claims for wrongful death; negligence, gross negligence, and willful and wanton negligence; negligent infliction of emotional distress; and piercing the corporate veil (25 January 2007 complaint). Plaintiffs’ complaint alleged that Scott improperly installed the elevator in contravention of the manufacturer’s specifications and standards, ANSI standards, industry standards, and National Electric Code standards and regulations. The complaint further alleged Pridgen had full knowledge of the North Carolina Building Code, all relevant health and safety regulations regarding residential construction, and all standards of construction, including those relating to residential elevators. After the elevator’s installation, Pridgen modified the elevator by: (1) removing the safety gate and other safety devices; and (2) turning off or otherwise modifying two safety devices. These modifications were allegedly made in order for Pridgen to paint the elevator walls and allowed the elevator to operate without the safety devices in place. Plaintiffs alleged that Lauren’s death was proximately caused by the improper elevator installation *and* the modification to its safety devices.

On 2 April 2007, Scott filed an answer denying the material allegations of plaintiffs’ complaint and asserting that plaintiffs’ claims against Scott were barred by the intervening and superseding negligence of the other defendants. On 28 August 2007, Scott filed a motion for judgment on the pleadings pursuant to Rule 12(c) of the Rules of Civil Procedure on the basis that “any negligence on the part of Scott is insulated and superseded by the negligence of Defendant Pridgen.” The trial court allowed Scott’s Rule 12(c) motion on 11 September

1. Plaintiff alleged that M. Garret, Inc. was formed by Pridgen for the sole purpose of “fraudulently and improperly siphoning assets and monies away from Pridgen and/or [Coastal] Estates,” and was the instrumentality and alter ego of Pridgen and Coastal Estates.

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2007, and plaintiffs' claims against Scott were dismissed without prejudice. The trial court did not include the basis of its ruling in the order. The trial court subsequently amended the order to allow plaintiff to re-file a complaint against Scott "within the time period prescribed by the statute of limitations and/or statute of repose."

On 12 October 2007, plaintiffs filed a second amended complaint against Pridgen, Coastal Estates, and Ocean Haven² (12 October 2007 complaint). Plaintiffs' claims against these defendants were subsequently settled.

On 21 July 2008, plaintiffs re-filed their complaint against Scott (21 July 2008 complaint). Plaintiffs alleged that Scott improperly installed the elevator in the elevator shaft. The elevator shaft was too wide for the elevator model that was installed, which created an excessive gap between the elevator cab and the shaft wall. Scott used non-Inclinators parts to bridge this gap. This was prohibited by Inclinators. After its installation, Scott failed to disconnect the electricity running to the elevator even though it had not passed inspection. Plaintiffs further alleged that Scott failed to utilize the lock out key, failed to supervise the elevator, failed to instruct Pridgen not to use the elevator until it passed inspection, and failed to warn Pridgen about the dangers of removing or altering any safety features.

On 22 September 2008, Scott filed an answer denying the material allegations of plaintiffs' complaint. Three days later, Scott filed a Rule 12(c) motion for judgment on the pleadings on the basis that plaintiffs' claims were barred by collateral and judicial estoppel. On 10 November 2008, the trial court granted Scott's motion and dismissed plaintiffs' claims with prejudice. The order did not specify the basis upon which the motion was granted.

Plaintiffs appeal.

II. Matters Outside of the Complaint

[1] In their first argument, plaintiffs contend that the trial court erred by considering whether the doctrines of collateral or judicial estoppel were applicable upon a Rule 12(c) motion because the pleadings in the prior action were not attached to or the subject of plaintiffs' 21 July 2008 complaint against Scott. We disagree.

2. M. Garrett, Inc. was not a named party in the second amended complaint and the claim for piercing the corporate veil was also not included. A claim for premises liability was alleged against the remaining defendants.

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Rule 12(c) of the Rules of Civil Procedure provides that “[i]f, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56” N.C. Gen. Stat. § 1A-1, Rule 12(c) (2007). The general rules about which documents can be considered on a Rule 12(c) motion are as follows: if documents are “attached to and incorporated within a complaint, they become part of the complaint. They may, therefore, be considered in connection with a Rule . . . 12(c) motion without converting it into a motion for summary judgment.” *Weaver v. Saint Joseph of the Pines, Inc.*, 187 N.C. App. 198, 204, 652 S.E.2d 701, 707 (2007). “A document attached to the moving party’s pleading may not be considered in connection with a Rule 12(c) motion unless the non-moving party has made admissions regarding the document.” *Reese v. Charlotte-Mecklenburg Bd. of Educ.*, 196 N.C. App. 539, 545, 676 S.E.2d 481, 486 (2009) (quotation omitted).

However, this Court has held the following when estoppel was the basis for a Rule 12(c) motion:

In determining what issues were actually litigated or determined by the earlier judgment, the court in the second proceeding is “free to go beyond the judgment roll, and may examine the pleadings and the evidence if any in the prior action.” . . . The burden is on the party asserting issue preclusion to show “with clarity and certainty what was determined by the prior judgment.”

Burgess v. First Union Nat’l Bank of N.C., 150 N.C. App. 67, 75, 563 S.E.2d 14, 20 (2002) (quoting *Miller Building Corp. v. NBBJ North Carolina, Inc.*, 129 N.C. App. 97, 100, 497 S.E.2d 433, 435 (1998)) (alteration and emphasis omitted).

In the instant case, Scott raised both collateral and judicial estoppel as affirmative defenses in its answer. The 25 January 2007 complaint that was dismissed was attached as an exhibit to Scott’s second answer. Scott filed the Rule 12(c) motion on the same basis. Plaintiffs responded with a memorandum of law in opposition to the motion and acknowledged the existence of the previous lawsuit. The trial court did not err in considering the pleadings in the prior action.

Even assuming *arguendo* the trial court erred by considering the pleadings in the prior action, the proper remedy would not be to reverse the ruling of the trial court, but rather to review its ruling under a Rule 56 summary judgment standard. *See Weaver*, 187 N.C. App. at 206, 652 S.E.2d at 708. This argument is without merit.

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III. Collateral Estoppel

[2] In their second argument, plaintiffs contend the trial court could not have properly granted Scott's motion for judgment on the pleadings on the basis of collateral estoppel because the 25 January 2007 complaint against Scott was dismissed without prejudice. We agree.

The doctrine of collateral estoppel is applicable where a defendant can establish "that the earlier suit *resulted in a final judgment on the merits*, that the issue in question was identical to an issue actually litigated and necessary to the judgment, and that both [plaintiff and defendant] were either parties to the earlier suit or were in privity with parties." *Thomas M. McInnis & Assoc. v. Hall*, 318 N.C. 421, 429, 349 S.E.2d 552, 557 (1986) (citation omitted) (emphasis added). In the instant case, there was no "final judgment on the merits." Rule 41(b) provides that all dismissals, with certain exceptions, operate as an adjudication upon the merits unless the trial court specifies the dismissal is without prejudice. N.C. Gen. Stat. § 1A-1, Rule 41(b) (2007); *Whedon v. Whedon*, 313 N.C. 200, 210, 328 S.E.2d 437, 443 (1985) ("[T]he major exception to the general proposition that an involuntary dismissal operates as a final adjudication is found in the power lodged by Rule 41(b) in the trial judge to specifically order that the dismissal is without prejudice and, therefore, not an adjudication on the merits." (citation omitted)). Plaintiffs' 25 January 2007 complaint against Scott was dismissed without prejudice. The trial court subsequently entered an amended order that specifically allowed plaintiffs to re-file their complaint within the time period prescribed by the statute of limitations. The doctrine of collateral estoppel was not applicable.

IV. Judicial Estoppel

[3] In their third argument, plaintiffs contend the trial court could not properly grant Scott's Rule 12(c) motion on the basis of judicial estoppel. We agree.

Our Supreme Court first recognized the doctrine of judicial estoppel in *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 591 S.E.2d 870 (2004), and noted that "the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle." *Id.* at 28, 591 S.E.2d at 888 (quotation omitted). The purpose of this doctrine is "to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the

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moment[.]” *Id.* (quotation omitted). “[J]udicial estoppel forbids a party from asserting a legal position inconsistent with one taken earlier in the same or related litigation.” *Price v. Price*, 169 N.C. App. 187, 191, 609 S.E.2d 450, 452 (2005). In *Whitacre P’ship*, our Supreme Court set forth three factors which may be considered in determining whether the doctrine is applicable:

First, a party’s subsequent position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party’s earlier position, so that judicial acceptance of an inconsistent position in a later proceeding might pose a threat to judicial integrity by leading to inconsistent court determinations or the perception that either the first or the second court was misled. Third, courts consider whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Whitacre P’ship, 358 N.C. at 29, 591 S.E.2d at 888-89 (internal citations and quotations omitted). The first factor is the only factor that must be present for judicial estoppel to apply. *Wiley v. United Parcel Serv., Inc.*, 164 N.C. App. 183, 188, 594 S.E.2d 809, 812 (2004). Our Supreme Court emphasized that judicial estoppel is limited to the context of inconsistent *factual* assertions and should not be applied to prevent the assertion of inconsistent legal theories. *Whitacre P’ship*, 358 N.C. at 32, 591 S.E.2d at 890. North Carolina’s liberal pleading rules permit a litigant to assert inconsistent, even contradictory, legal positions within a lawsuit. *Id.*; N.C. Gen. Stat. § 1A-1, Rule 8(e)(2) (2007). “[J]udicial estoppel is to be applied in the sound discretion of our trial courts.” *Whiteacre P’ship*, 358 N.C. at 33, 591 S.E.2d at 891. Where the essential element of inconsistent positions is not present, it is an abuse of discretion to bar plaintiff’s claim on the basis of judicial estoppel. See *Harvey v. McLaughlin*, 172 N.C. App. 582, 585, 616 S.E.2d 660, 663 (2005), *disc. review denied*, 360 N.C. 289, 628 S.E.2d 250 (2006).

The dispositive issue is whether plaintiffs’ position, based upon the factual allegations in the instant case, was clearly inconsistent with their position as asserted in the earlier complaint. In order to make this determination, a detailed analysis of the factual allegations of the complaints is required.

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Scott contends that the following constitute inconsistent positions by plaintiff. First, in the 25 January 2007 complaint, plaintiffs alleged that Pridgen had full knowledge of all relevant health and safety regulations regarding residential construction, including those relating to residential elevators based upon his experience as a licenced general contractor and was aware of the potential hazards created by the removal of the elevator's safety features. Plaintiffs further alleged that Pridgen negligently allowed use of the elevator without the safety devices. Scott argues that in the 21 July 2008 complaint that plaintiffs alleged that Pridgen was entirely unaware of those dangers because Scott did not review the owner's manual with him.

Scott misconstrues the allegations in plaintiffs' 21 July 2008 complaint. Plaintiffs alleged in the 2008 complaint that Inclinator, the manufacturer of the elevator, provided Scott, the installer of the elevator, an "Inclinator Company Safety Checklist" and an "Owner's Manual." The complaint alleged that Scott had a duty to go over the Safety Checklist and the safety provisions contained in the Owner's Manual before turning the elevator over to the owner for operation. Plaintiffs asserted that breach of this duty was negligence that proximately caused the death of Lauren.

The 2008 complaint was directed solely at Scott and not at Pridgen. The allegations in the 25 January 2007 amended complaint dealing with Pridgen's knowledge and experience in the construction industry in general are not inconsistent with the allegations in the 2008 complaint pertaining to specific duties owed by Scott to the owner of the premises under the Safety Checklist and Owner's Manual. These documents contained specific warnings and procedures to be followed when the elevator was used by children. The allegations were not factually inconsistent and could not serve as a basis for judicial estoppel in this case.

Scott's second asserted inconsistency deals with which party had "control" over the elevator at the time of the incident. In the second amended complaint filed in this action, plaintiffs alleged that "Coastal, Pridgen, and/or Ocean Haven had control over the Residence, Elevator, and Elevator Shaft on and prior to July 23, 2006." This allegation was made under plaintiffs' fourth claim for relief, premises liability. *See Nelson v. Freeland*, 349 N.C. 615, 632, 507 S.E.2d 882, 892 (1998) (holding that landowners and occupiers of land have a "duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors."). Plaintiffs alleged Coastal, Pridgen, and

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Ocean Haven, as owners of the elevator, had a duty to all lawful visitors to maintain the elevator in a reasonably safe condition and to warn visitors of dangerous conditions or hidden perils. In plaintiffs' 2008 complaint against Scott, plaintiffs alleged that Scott was the responsible agent for the elevator such that it was in control of and possessed supervisory responsibility with regard to the elevator until it passed final inspection by New Hanover County. Plaintiffs further alleged that Scott failed to utilize the keylock out or otherwise secure the elevator, which allowed the elevator to be operated without restriction. These allegations are not inconsistent. As the owner of the premises, Coastal Estates, Pridgen, and Ocean Haven had a duty to visitors to the condominium. This duty does not exclude there being a duty on the part of Scott, under the applicable building code regulations, not to allow the elevator to be used until it had been inspected by the applicable authority and approved. The law in North Carolina clearly provides that there can be more than one proximate cause of an injury. *Adams v. Mills*, 312 N.C. 181, 194, 322 S.E.2d 164, 172 (1984). Plaintiffs are entitled to plead alternative theories of liability against different defendants. N.C. Gen. Stat. § 1A-1, Rule 8(e)(2); *Whitacre P'ship*, 358 N.C. at 32, 591 S.E.2d at 890.

Scott's third alleged inconsistency relates to the proximate cause of Lauren's death. As stated above, "[i]t is well settled that there may be more than one proximate cause of an injury." *Adams*, 312 N.C. at 194, 322 S.E.2d at 172. Further, proximate cause must be established by the factual allegations in the complaint and is not a factual allegation itself. See *Pardue v. Speedway, Inc.*, 273 N.C. 314, 318, 159 S.E.2d 857, 859 (1968) ("In an action or defense based upon negligence, it is not sufficient to allege the mere happening of an event of an injurious nature and call it negligence on the part of the party sought to be charged. . . . [N]egligence is not a fact in itself, but is the legal result of certain facts. Therefore, the facts which constitute the negligence [alleged] and also the facts which establish such negligence as the proximate cause, or as one of the proximate causes, of the injury must be alleged." (quotation omitted)). Allegations of proximate cause are legal theories upon which plaintiffs may assert inconsistent, even contrary positions. This argument is without merit.

Because plaintiffs did not take positions that were *factually* inconsistent, the doctrine of judicial estoppel does not apply. Nothing in the record indicates that plaintiffs were playing " 'fast and loose' with the judicial system[.]" *Whitacre P'ship*, 358 N.C. at 26, 591 S.E.2d at 887, but were rather setting forth differing legal theories of liability

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for Lauren's death against multiple defendants, which is permissible under Rule 8 of the Rules of Civil Procedure.

Neither the doctrine of collateral estoppel nor judicial estoppel are applicable in the instant case. The trial court erred by granting Scott's Rule 12(c) motion for judgment on the pleadings. The trial court's order is reversed. This case is remanded to the trial court for further proceedings.

REVERSED and REMANDED.

Judges JACKSON and HUNTER, JR. concur.

ACCELERATED FRAMING, INC., PLAINTIFF v. EAGLE RIDGE BUILDERS, INC.,
DEFENDANT

No. COA09-1399

(Filed 2 November 2010)

1. Parties— real party in interest—stipulation

The trial court had subject matter jurisdiction in a breach of contract case even though defendant contended that plaintiff was not the real party in interest since it did not sign the pertinent contract. The parties stipulated that plaintiff was a party to the contract, and it was binding since defendant never filed a motion to set aside the stipulation. Although defendant further contended that plaintiff could not sue since it was not authorized to do business in North Carolina, defendant failed to make a motion under N.C.G.S. § 55-15-02(a), thus waiving this argument.

2. Evidence— photographs—illustrative purposes—later considered as substantive evidence

The trial court did not err in a breach of contract case by relying on photographs as substantive evidence when they were originally admitted for illustrative purposes. The trial court could properly revisit its prior evidentiary ruling. Further, defendant had the opportunity to cross-examine a witness about the photographs.

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Appeal by defendant from order entered 5 June 2009 by Judge Joseph N. Crosswhite in Watauga County Superior Court. Heard in the Court of Appeals 23 March 2010.

di Santi, Watson, Capua, & Wilson, by Frank C. Wilson, III, for plaintiff-appellee.

Unti & Lumsden LLP, by Michael L. Unti, for defendant-appellant.

GEER, Judge.

This appeal arises out of a dispute between plaintiff Accelerated Framing, Inc. and defendant Eagle Ridge Builders, Inc. over a contract to perform carpentry work on property located in Banner Elk, North Carolina. Eagle Ridge appeals from the trial court's award of damages to Accelerated Framing on its breach of contract claim, contending primarily that Accelerated Framing is not the real party in interest. The parties, however, stipulated at trial that they wished to consider the contract as being between Accelerated Framing and Eagle Ridge. Because Eagle Ridge never filed a motion to set aside that stipulation, it is binding and Accelerated Framing is the real party in interest.

Facts

On 12 June 2008, Accelerated Framing brought a breach of contract claim against Eagle Ridge, seeking payment due for carpentry work Accelerated Framing performed on a log cabin that was being built by Eagle Ridge. Accelerated Framing also brought claims for a mechanic's lien and for recovery based on *quantum meruit*. Eagle Ridge subsequently counterclaimed for breach of contract. On 26 May 2009, a bench trial was held in Watauga County Superior Court. On 5 June 2009, the trial court entered an order making the following findings of fact.

On or about 29 January 2008, Accelerated Framing and Eagle Ridge entered into a written contract agreeing that Eagle Ridge would pay Accelerated Framing \$14,100.00 in weekly draws for framing work on a log cabin. Accelerated Framing substantially completed the work under that contract and was paid \$12,600.00.

On 7 May 2008, the parties entered into an oral contract in which Eagle Ridge agreed to pay Accelerated Framing \$20,000.00 to complete the remaining work on the cabin. Under that oral contract, Accelerated Framing incurred costs for four weeks of work spent finishing and sanding the interior of the cabin. Eagle Ridge knew that

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Accelerated Framing was working on the property at that time and provided the supplies needed to complete the work. Those supplies were stored in Accelerated Framing's storage trailer on the property.

Before Accelerated Framing could fully complete the work on the property, Eagle Ridge told Accelerated Framing not to return to the job site. The trial court found that "photographs taken on May 15 and introduced by the Plaintiff for illustrative purposes show the condition of the property and the work completed as of the time that the Plaintiff had substantially completed its work." The trial court found that, as a result of Eagle Ridge's ordering Accelerated Framing off the job site before the work was completed, Accelerated Framing suffered damages in the amount of \$1,500.00 under the written contract and damages in the amount of \$12,140.00 under the oral contract.

On the other hand, following the termination of the contract, Eagle Ridge incurred costs to complete some of the work not performed by Accelerated Framing under the oral contract. The trial court determined that, based on those costs, Eagle Ridge was entitled to an offset of \$2,050.00 to be applied against Accelerated Framing's damages. The trial court then awarded Accelerated Framing damages of \$11,590.00 plus interest at the legal rate running from 17 June 2008, with each party to bear its own costs. Eagle Ridge timely appealed to this Court.

I

[1] Eagle Ridge first contends that the trial court lacked subject matter jurisdiction over this action. Eagle Ridge asserts that Accelerated Framing was not a party to the contract because the contract was signed by Eagle Ridge and by David Gentry, in his individual capacity, even though he is also the President and owner of Accelerated Framing. Therefore, according to Eagle Ridge, Accelerated Framing was not the real party in interest and lacked standing to sue.

At trial, however, the parties stipulated that they wished to proceed as if the contract were between Accelerated Framing and Eagle Ridge. Plaintiff's counsel stated, without any objection by defendant: "We have agreed that although Mr. Gentry personally is on this contract[,] [w]e are going to consider it to be through this corporation. They are responsible for all liabilities and rights under that contract."

Eagle Ridge contends that the parties' stipulation was ineffective because subject matter jurisdiction cannot be waived. *See Reece v.*

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Forga, 138 N.C. App. 703, 704, 531 S.E.2d 881, 882 (“A party may not waive jurisdiction, and a court has inherent power to inquire into, and determine, whether it has jurisdiction and to dismiss an action *ex mero motu* when subject matter jurisdiction is lacking.” (internal citation omitted)), *disc. review denied*, 352 N.C. 676, 545 S.E.2d 428 (2000). Eagle Ridge’s sole basis for arguing that the trial court lacked subject matter jurisdiction is that Accelerated Framing, which did not sign the contract, is not the real party in interest.

Eagle Ridge has, however, overlooked Rule 17(a) of the North Carolina Rules of Civil Procedure, which provides:

No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

In *Lawrence v. Wetherington*, 108 N.C. App. 543, 547, 423 S.E.2d 829, 831 (1993), this Court, applying Rule 17, held that a real party in interest can ratify an action by stipulation. The plaintiffs, Russell and Evelyn Lawrence, doing business as Carolina Vinyl Siding, brought a breach of contract action against the defendants. *Id.* at 545, 423 S.E.2d at 830. When the defendants argued at trial that Carolina Vinyl Siding, the corporation with which they signed the contract, was a necessary and proper party, the parties stipulated that the plaintiffs’ participation in the lawsuit would be binding on Carolina Vinyl Siding. *Id.* at 546-57, 423 S.E.2d at 831. The plaintiffs’ attorney stated:

“We would like to stipulate now that Russell Lawrence and Evelyn Lawrence, whether they are a corporation or individual doing business as that, they would all be bound by the decision in this case and that includes whether it is a corporation called . . . ‘Carolina Vinyl Siding and Home Improvements, Inc.’ or ‘Carolina Siding, Inc.’ or ‘Russell Lawrence and Evelyn Lawrence doing business as Carolina Siding.’ ”

Id. at 547, 423 S.E.2d at 831.

On appeal, the defendants in *Lawrence* contended that, because the plaintiffs’ corporation was a necessary party to the case, no valid judgment could be entered against the defendants arising out of a contract between them and the corporation without the corporation

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being joined in the action. *Id.* at 546, 423 S.E.2d at 831. This Court rejected that argument, explaining that by the stipulation, “Carolina Vinyl Siding became a party plaintiff to this action by ratification.” *Id.* at 547, 423 S.E.2d at 831.

Eagle Ridge’s subject matter jurisdiction argument is controlled by *Lawrence*. Here, the parties, through their stipulation, agreed that Accelerated Framing was a party to the contract and, therefore, established that Accelerated Framing is the real party in interest. *See Blair v. Fairchilds*, 25 N.C. App. 416, 419, 213 S.E.2d 428, 430-31 (“Where facts are stipulated, they are deemed established as fully as if determined by the verdict of a jury.”), *cert. denied*, 287 N.C. 464, 215 S.E.2d 622 (1975). Eagle Ridge never sought to set aside the stipulation. *See id.* at 419-20, 213 S.E.2d at 431 (explaining that party wishing to set aside stipulation should move to set it aside).

Moreover, Eagle Ridge admitted that Accelerated Framing is the real party in interest when it admitted in its answer that “plaintiff” (which was Accelerated Framing) and Eagle Ridge entered into the contract. Eagle Ridge also admitted that fact in its counterclaim when it alleged that “plaintiff” (identified as Accelerated Framing) breached its contract with Eagle Ridge. “Facts alleged in the complaint and admitted in the answer are conclusively established by the admission.” *Harris v. Pembaur*, 84 N.C. App. 666, 670, 353 S.E.2d 673, 677 (1987).

Eagle Ridge also contends that Accelerated Framing cannot sue, in any event, because it is not authorized to do business in North Carolina. Eagle Ridge relies on N.C. Gen. Stat. § 55-15-02(a) (2009), which requires a foreign corporation transacting business in this state to obtain a certificate of authority before the trial of any proceeding brought in the state. That statute provides, however, that “[a]n issue arising under this subsection must be raised by motion and determined by the trial judge prior to trial.” *Id.* As the record gives no indication that Eagle Ridge made such a motion, Eagle Ridge has waived this argument. *See also Spivey & Self, Inc. v. Highview Farms, Inc.*, 110 N.C. App. 719, 729, 431 S.E.2d 535, 541 (holding that because defendants failed to raise issue whether plaintiff foreign corporation had certificate of authority before trial, defendants waived right to object on that basis), *disc. review denied*, 334 N.C. 623, 435 S.E.2d 342 (1993).

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II

[2] Eagle Ridge next contends that the trial court improperly relied upon photographs as substantive evidence when the photographs were admitted into evidence only for illustrative purposes. Under N.C. Gen. Stat. § 8-97 (2009), “[a]ny party may introduce a photograph, video tape, motion picture, X-ray or other photographic representation as substantive evidence upon laying a proper foundation and meeting other applicable evidentiary requirements. This section does not prohibit a party from introducing a photograph or other pictorial representation solely for the purpose of illustrating the testimony of a witness.”

At trial, Accelerated Framing sought to introduce photographs purporting to show the work Accelerated Framing had completed on the house as of 15 May 2008, the day it left the job site. The trial court said: “I will allow . . . the photographs for illustrative purposes.” The trial court subsequently found, in its decision, that “photographs taken on May 15 and introduced by the Plaintiff for illustrative purposes show the condition of the property and the work completed as of the time that the Plaintiff had substantially completed its work.”

We agree with Eagle Ridge that this finding of fact indicates that the trial court used the photographs as substantive evidence. We disagree with Eagle Ridge’s contention, however, that the trial court, in this bench trial, had no authority to change its mind and consider the photographs as substantive evidence. Our Supreme Court has specifically held that, even in a jury trial, “[i]t is not error for a judge to change his ruling on the admissibility of evidence.” *State v. Adcock*, 310 N.C. 1, 14, 310 S.E.2d 587, 595 (1984). Indeed, “a trial judge who determines that he has committed error during the course of a trial certainly should take whatever steps necessary to cure or correct a detected error. Curative action often precludes unnecessary and prolonged review by the appellate courts.” *Id.* See also Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 20, at 87 (6th ed. 2004) (“A ruling [on the admissibility of evidence] is not necessarily final, even when not stated to be conditional, for the judge may strike out evidence theretofore admitted or admit evidence theretofore excluded.”). Thus, the trial court, in this case, could properly revisit its prior evidentiary ruling and consider the photographs as substantive evidence and not just for illustrative purposes.

Mr. Gentry testified that the photographs depicted the job site and the work his company had completed as of the day they left the

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job site. This testimony was sufficient to lay the necessary foundation for admission of the photographs. *See Horne v. Vassey*, 157 N.C. App. 681, 686, 579 S.E.2d 924, 927 (2003) (“In order for a photograph to be admitted into evidence, the accuracy of a photograph must be demonstrated by extrinsic evidence that the photograph is a true representation of the scene, object or person it purports to portray.”); *Sellers v. CSX Transp., Inc.*, 102 N.C. App. 563, 565, 402 S.E.2d 872, 873 (1991) (“Photographs may be used as substantive evidence upon the laying of a proper foundation, and may be admitted when they are a fair and accurate portrayal of the place in question and are sufficiently authenticated.” (internal citation omitted)).

Eagle Ridge made no argument at trial and does not argue on appeal that the foundation for admission of the photographs as substantive evidence was lacking. Instead, Eagle Ridge merely seeks to cast doubt on the credibility of Mr. Gentry’s testimony that those pictures were in fact taken on 15 May 2008. The trial judge, in making a finding relying on those photographs, necessarily concluded that Mr. Gentry was telling the truth when he testified that the photographs were taken on 15 May 2008—a credibility determination properly made by the trial court.

Moreover, Eagle Ridge does not argue that it was unfairly prejudiced by the trial court’s consideration of the photographs as substantive evidence. Eagle Ridge had the opportunity to and did cross-examine Mr. Gentry about the photographs and does not argue on appeal that it would have done anything different had it known the photographs were going to be considered as substantive evidence rather than just for illustrative purposes. In light of these circumstances, we affirm.

Affirmed.

Judges ELMORE and ERVIN concur.

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STATE OF NORTH CAROLINA v. NORMAN BAXTER BANNER

No. COA10-123

(Filed 2 November 2010)

1. Appeal and Error— denial of motion to suppress—properly preserved

Defendant properly preserved for appellate review the denial of his motion to suppress evidence. Defendant specifically reserved his right to appeal the denial of the motion to suppress before entering his guilty plea and properly gave oral notice of appeal.

2. Constitutional Law— search and seizure—search incident to arrest—order for arrest valid

The trial court did not err in denying defendant's motion to suppress evidence seized as a result of a search of defendant incident to arrest for his failure to appear in court due to his imprisonment. The underlying charges that formed the basis for the arrest order remained unresolved at the time the order was executed and the recall of the order was not mandatory under N.C.G.S. § 15A-301(g)(2). Because the arrest was valid, the search incident to arrest was also valid.

Appeal by defendant from judgment entered 25 August 2009 by Judge Robert C. Ervin in Caldwell County Superior Court. Heard in the Court of Appeals 31 August 2010.

Attorney General Roy Cooper, by Assistant Attorney General John P. Scherer II, for the State.

Mercedes O. Chut for defendant-appellant.

HUNTER, JR., Robert N., Judge.

The Lenoir County police discovered drugs in defendant's possession after executing an order to arrest for failure to appear. Defendant argues the order to arrest was invalid because clerical officials were aware the order was issued erroneously, and therefore, his arrest and the search incident to arrest were both unconstitutional. Provided the underlying charges that form the basis for an order to arrest for failure to appear remain unresolved at the time the order is executed, the order is not invalid—and an arrest made pursuant to

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that order is not unconstitutional—merely because a clerk or judicial official has failed to recall the order after learning it was issued erroneously. Therefore, we affirm the trial court’s order denying defendant’s motion to suppress.

I. Factual and Procedural Background

On 22 February 2007, defendant was cited to appear in Wilkes County Court for driving with a fictitious tag, driving while license revoked, and driving without insurance (collectively, “pending Wilkes County charges”). On 7 June 2007 in Caldwell County, he was convicted of three unrelated charges of driving while license revoked (“unrelated charges”) and transferred to the Neuse Correctional Institution.¹ The pending Wilkes County charges were continued numerous times by his attorney, and a court date was eventually set for 29 August 2007. On his court date for the pending Wilkes County charges, defendant remained incarcerated due to his conviction on the unrelated charges, and no writ was issued to secure his presence in court. When defendant failed to appear, the court issued an order for his arrest.

The order for arrest remained outstanding when defendant was scheduled to be released by the North Carolina Department of Corrections (“NCDOC”).² Because NCDOC policy prohibits the release of inmates with outstanding orders for arrest, NCDOC employees asked an employee of the Office of the Wilkes County Clerk of Superior Court to recall the order, explaining defendant had been incarcerated at the time the order for arrest was issued. The NCDOC then released defendant, apparently assuming the arrest order would be recalled.

However, the clerk of court failed to recall the order promptly. On 1 October 2007, officers with the Lenoir Police Department responded to a disturbance at the Employment Security Commission (“ESC”). Several ESC employees had complained to the police that defendant was intoxicated in the ESC parking lot, indicating they were concerned he would attempt to operate a motor vehicle. The police communications department performed a check for outstanding warrants and informed the officers of the order for arrest, which had not yet been

1. The record suggests that, at the time of his conviction for the unrelated charges, defendant was already incarcerated in the Caldwell County Detention Center.

2. Based on the record and the parties’ briefs, it is unclear why defendant was being released, but it appears that he had completed his sentence for the unrelated charges.

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recalled. They soon found defendant, who was on foot, and placed him under arrest. The officers searched him incident to arrest and discovered he was in possession of marijuana and cocaine. The record indicates the pending Wilkes County charges were unresolved on the date defendant was arrested.³ The Wilkes County Clerk of Court finally recalled the order on 19 October 2007—more than two weeks after defendant’s arrest.

Defendant was subsequently indicted for simple possession of cocaine and habitual felon status. He filed a motion to suppress, seeking to exclude from evidence the drugs discovered by the police. At his suppression hearing, the State did not contend the officers had independent probable cause to arrest or search defendant; rather, the officers were relying solely on the order to justify the arrest and subsequent search. The trial court made oral findings of fact in accord with the factual background set forth above. The trial court denied the motion to suppress. Defendant entered a guilty plea and appealed the denial of his motion to suppress to this Court.

II. Jurisdiction and Standard of Review

[1] A criminal defendant is entitled to mandatory appellate review of an order denying a motion to suppress when his conviction judgment was entered pursuant to a guilty plea. *See, e.g., State v. Dickson*, 151 N.C. App. 136, 137, 564 S.E.2d 640, 640 (2002). This is a conditional statutory right, however, and the defendant must notify the State—with specificity—that he intends to appeal the denial of the motion to suppress before entering his guilty plea. *State v. McBride*, 120 N.C. App. 623, 625, 463 S.E.2d 403, 404 (1995) (citing *State v. Tew*, 326 N.C. 732, 735, 392 S.E.2d 603, 605 (1990); *State v. Walden*, 52 N.C. App. 125, 126-27, 278 S.E.2d 265, 266 (1981); *State v. Reynolds*, 298 N.C. 380, 396-97, 259 S.E.2d 843, 853 (1979)). Here, defendant specifically reserved his right to appeal the denial of the motion to suppress before entering his guilty plea. He also properly gave oral notice of appeal. Therefore, defendant is entitled to appeal the denial of his motion to suppress as a matter of right, and we have jurisdiction over his appeal.⁴

The parties have stipulated to all material facts. When reviewing the denial of a motion to suppress, conclusions of law are reviewed

3. This fact is critical because, as we explain *infra*, when the charges upon which an order to arrest is based are fully resolved, the order for arrest is automatically recalled.

4. Contrary to the assertions in the parties’ briefs, defendant does not enjoy an appeal as of right under N.C. Gen. Stat. § 7A-27(b).

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de novo. *E.g.*, *State v. Jarrett*, 203 N.C. App. 675, 677, 692 S.E.2d 420, 423 (2010).

III. Analysis

[2] Defendant makes a three-part argument on appeal: (1) no probable cause existed at the time of his search because the order to arrest was invalid; (2) there is no good-faith exception to Article I, Section 20 of the North Carolina Constitution;⁵ therefore, (3) the exclusionary rule bars any evidence obtained as a result of his arrest. The State claims the officers were justified in relying on the order under a mistake of fact theory,⁶ and in the alternative, the good-faith exception applies. Defendant's argument fails (although not for the reasons asserted by the State) because the order for arrest was valid.

Evidence obtained in violation of the Fourth Amendment's guarantee against unreasonable searches and seizures is generally excluded at trial. *See, e.g.*, *Hudson v. Michigan*, 547 U.S. 586, 591, 165 L. Ed. 2d 56, 64 (2006) (discussing the application of the exclusionary rule); 1 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 1.6, at 186 (2004) ("In the typical case, the impact of the Fourth Amendment exclusionary rule is to bar from use *at trial* evidence obtained by an unreasonable search or seizure."). The exclusionary rule also applies to evidence obtained in violation of the North Carolina Constitution. *See State v. Carter*, 322 N.C. 709, 724, 370 S.E.2d 553, 562 (1988). In *United States v. Leon*, the United States Supreme Court approved an exception to the federal exclusionary rule: "evidence obtained in violation of the Fourth Amendment by officers acting in objectively reasonable reliance on a search warrant issued by a neutral and detached magistrate need not be excluded, as a matter of federal law." 468 U.S. 897, 927, 82 L. Ed. 2d 677, 701 (1984) (Blackmun, J., concurring) (summarizing the Court's holding). This is known as the "good-faith exception." The *Leon* Court explained that suppression of

5. The North Carolina Constitution provides that "[g]eneral warrants, whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and shall not be granted." N.C. Const. art. I, § 20.

6. Specifically, the State argues the officers were relying on the validity of the order to arrest to give them probable cause, and because this mistake was reasonable, they had probable cause to arrest despite the order's invalidity. In other words, the officers were entitled to rely on the order to arrest because they had no reason to know it was invalid. This is merely an attempt to utilize the good-faith exception without referring to it as the "good-faith exception." Furthermore, as we explain *infra*, the order was valid.

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evidence is only required when doing so will further the goal of the exclusionary rule—deterrence. *Id.* at 918 n.19, 82 L. Ed. 2d at 695 n.19 (majority opinion). There is disagreement over whether there is such an exception to the North Carolina Constitution.⁷ Thus, it is possible that evidence not excluded by the federal constitution might be excluded by the North Carolina Constitution.

Not all searches and seizures require a warrant. A search of a suspect's *person* incident to a constitutional arrest requires no additional justification. *See United States v. Robinson*, 414 U.S. 218, 235, 38 L. Ed. 2d 427, 441 (1973); *cf. Arizona v. Gant*, — U.S. —, —, 173 L. Ed. 2d 485, 491 (2009) (holding that the blanket search incident to arrest exception does *not* apply to “a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle”). This exception to the general search warrant requirement is based on officer safety and evidence preservation concerns. *Gant*, — U.S. at —, 173 L. Ed. 2d at 493 (citing *Robinson*, 414 U.S. at 230-34, 38 L. Ed. 2d at 437-42; *Chimel v. California*, 395 U.S. 752, 763, 23 L. Ed. 2d 685, 694 (1969)).

According to defendant, the order for arrest was invalid because the Wilkes County Clerk of Court failed to recall it as requested. We disagree. Chapter 15A of the North Carolina General Statutes distinguishes between arrest *warrants* and *orders* for arrest—they are separate, distinct types of criminal processes. *See* N.C. Gen. Stat. §§ 15A-304 to -305 (2009) (establishing these processes in separate statutes and creating different issuance rules). Two circumstances under which an order for arrest may be issued are when an individual fails to appear pursuant to a criminal summons, N.C. Gen. Stat. § 15A-305(b)(3), and when “[i]n any criminal proceeding in which the defendant has become subject to the jurisdiction of the court, it becomes necessary to take the defendant into custody,” N.C. Gen. Stat.

7. *Compare Carter*, 322 N.C. at 722-24, 370 S.E.2d at 561-62 (refusing to allow a good-faith exception to the North Carolina Constitution with respect to non-testimonial identification orders), Robert H. Hobgood, *I-95 A/K/A The Drug Trafficker's Freeway, and Its Impact on State Constitutional Law*, 21 Campbell L. Rev. 237, 259-62 (1999) (discussing *Carter* and stating that there is no good-faith exception to the North Carolina Constitution), and Irving Joyner, *Criminal Procedure in North Carolina* § 8.10, at 709 (3d ed. 2006) (stating that the North Carolina Supreme Court has rejected the good-faith exception), *with State v. Garner*, 331 N.C. 491, 506-08, 417 S.E.2d 502, 510-11 (1992) (rejecting the notion that Article I, Section 20 of the North Carolina Constitution provides more protection than the Fourth Amendment to the United States Constitution while approving the use of the inevitable discovery rule).

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§ 15A-305(b)(5).⁸ The issuing official is permitted—but not required—to withdraw the order if he has “good cause” to do so. *See* N.C. Gen. Stat. § 15A-301(g)(2) (2009) (setting forth several circumstances under which an order for arrest “may” be recalled). The disposition of all charges forming the basis for an order for arrest “shall effect the recall” of that order without any action by a judicial official. N.C. Gen. Stat. § 15A-301(g)(3).

Here, the charges upon which the order for arrest was based (the pending Wilkes County charges) had not been resolved by the time defendant was arrested. Thus, there was no automatic recall of the order. Even if good cause to recall existed, recall was not *mandatory* under section 15A-301(g)(2); therefore, the failure to recall did not nullify the order. The officers were entitled to rely on it, and no independent probable cause was required to arrest defendant. Because the arrest was valid, the search incident to arrest was also valid. Accordingly, we have no occasion to resolve the disagreement over whether there is a good-faith exception to Article I, Section 20 of the North Carolina Constitution.

Affirmed.

Judges HUNTER, Robert C., and LEWIS concur.

8. While defendant argues the order for arrest was issued under a mistaken belief that he was not incarcerated when he failed to appear in court, he does not claim the issuance of the order constituted an abuse of discretion or that the original criminal summons was not based on probable cause.

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ROSE HUNTER, ADMINISTRATOR OF THE ESTATE OF AUNDREA TASHAE HUNTER, PLAINTIFF V. TRANSYLVANIA COUNTY DEPARTMENT OF SOCIAL SERVICES; COUNTY OF TRANSYLVANIA, NORTH CAROLINA; D'ANDRE CURRY; CARSON GRIFFIN; AND NORIDA MOODY, DEFENDANTS

No. COA10-288

(Filed 2 November 2010)

1. Appeal and Error— interlocutory order—substantial right—immunity

While the denial of a summary judgment motion is typically an interlocutory order, a claim based on immunity affects a substantial right and is entitled to immediate review.

2. Immunity— public official immunity—social worker

The trial court erred in a wrongful death case by denying defendant Department of Social Services (DSS) social worker's motion to dismiss and granting plaintiff partial summary judgment on the issue of defendant's defense of public official immunity. Based on the underlying circumstances of defendant's role at DSS and her role in the investigation, she was a representative of the State who was vested with and exercised discretion consistent with those who qualify as public officials. Thus, the public official doctrine barred plaintiff's claim against defendant in her individual capacity.

Appeal by defendant Norida Moody from order entered 21 January 2010 by Judge Dennis J. Winner in Transylvania County Superior Court. Heard in the Court of Appeals 14 September 2010.

Prince, Youngblood & Massagee, PLLC, by Sharon B. Alexander, for plaintiff-appellee.

Womble Carlyle Sandridge & Rice, PLLC, by Sean F. Perrin, for defendant-appellant Norida Moody.

MARTIN, Chief Judge.

Defendant Norida Moody ("Moody") appeals from an order of the trial court denying her motion to dismiss and granting plaintiff partial summary judgment on the issue of Moody's defense of public official immunity. For the reasons which follow, we reverse the trial court's order.

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Plaintiff Rose Hunter is the maternal grandmother of the decedent, Aundrea Hunter. From April 2005 to December 2006, the time of Aundrea's death, plaintiff had been contacting Transylvania County Department of Social Services ("DSS") alleging that Stacy Hunter and her boyfriend, D'Andre Curry, had been neglecting Stacy's children. Individual reports were filed April 2005, July 2006, and November 2006. Moody, a social worker at DSS, was assigned to investigate the April 2005 and November 2006 reports. In conducting an investigation of neglect, the policy of DSS was to conduct interviews primarily with accused parent or parents, talk to collateral witnesses, and visit the home. Per DSS policy, Moody conducted office interviews with plaintiff and Stacy separately and together, and also conducted a home visit at Stacy's apartment. From her investigation, Moody had not seen any evidence of abuse or neglect. The collateral witnesses she had interviewed had downplayed any reports of neglect, as did Stacy. Plaintiff was the only witness who expressed concern to Moody. Visits to the home revealed that the children appeared well-fed and adequately cared for. Due to a lack of evidence to necessitate further action after the investigation of the April 2005 and June 2006 reports, those cases were closed. The November 2006 report was ongoing when then-infant Aundrea died from brain hemorrhage, also known as shaken baby syndrome, at the hands of Stacy's boyfriend Curry. Prior to and separate from this litigation, Curry was sentenced to two years in prison.

Plaintiff filed a wrongful death action on behalf of Aundrea Hunter's estate against several defendants, including Moody, alleging that Aundrea's death was proximately caused by their negligence. Plaintiff alleged, among other things, that Moody, individually and in her official capacity as an agent of Transylvania County DSS, failed to thoroughly investigate and adequately respond to the claims of neglect. On 22 December 2009, defendants filed a joint motion for summary judgment, seeking dismissal of the claims against Transylvania County DSS, County of Transylvania, Carson Griffin, and Moody in her official capacity based on sovereign immunity and those against Moody in her individual capacity based on public official immunity. By order entered January 2010, the trial court determined that there was no issue of material fact with regard to Moody's individual defense of public official immunity, and denied Moody's motion to dismiss based on public official immunity, and granted partial summary judgment in favor of the plaintiff on that issue. The trial judge granted summary judgment in favor of Transylvania County

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DSS, County of Transylvania, Carson Griffin, and Moody in her official capacity based on sovereign immunity. Moody gave notice of appeal.

[1] Moody's appeal is clearly from an interlocutory order. Generally, there is no right of immediate appeal from an interlocutory order. *See Christmas v. Cabarrus Cty.*, 192 N.C. App. 227, 230, 664 S.E.2d 649, 651-52 (2008). However, interlocutory appeals are proper when the order denies an appellant a substantial right. *Id.* While the denial of a summary judgment motion would not ordinarily affect a substantial right, the denial of a summary judgment motion based on a claim of immunity is immediately appealable, because if a case were permitted to proceed to trial regardless of a valid immunity claim, the immunity would be effectively lost. *See Slade v. Vernon*, 110 N.C. App. 422, 425, 429 S.E.2d 744, 746 (1993). Accordingly, we address the merits of Moody's appeal.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009). The moving party bears the burden of showing that no triable issue of fact exists. *See Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985). One way of showing that no issue of fact exists is to show that the non-moving party cannot overcome an affirmative defense which would bar the claim. *See Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989).

[2] Moody argues the trial court erred by denying her motion to dismiss plaintiff's complaint against her in her individual capacity. Specifically, Moody contends she is entitled to public official immunity as a representative of the State, and that the public official doctrine bars plaintiff's claim against defendant in her individual capacity. We agree.

A public official can only be held individually liable for damages when the conduct complained of is malicious, corrupt, or outside the scope of official authority. *See Mabrey v. Smith*, 144 N.C. App. 119, 122, 548 S.E.2d 183, 186, *disc. review denied*, 354 N.C. 219, 554 S.E.2d 340 (2001). A public employee, as opposed to a public official, can be held individually liable for mere negligence in the performance of his governmental or discretionary duties. *See Meyer v. Walls*, 347 N.C. 97,

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112, 489 S.E.2d 880, 888 (1997). Since plaintiff concedes, in response to Moody's interrogatories, that Moody did not act corruptly or maliciously, to survive a motion for summary judgment plaintiff's claim must rest on whether Moody was vested with sufficient power and discretion as a social worker to qualify as a public official, or whether Moody should be classified as a public employee. This Court has previously explained that "[a] public official is one whose position is created by the N.C. Constitution or the N.C. General Statutes and exercises some portion of sovereign power and discretion, whereas public employees perform ministerial duties." *Mabrey*, 144 N.C. App. at 122, 548 S.E.2d at 186.

The director of social services of a county is a position created by statute; the director has, *inter alia*, the responsibility "to assess reports of child abuse and neglect and to take appropriate action to protect such children[.]" N.C. Gen. Stat. § 108A-14(a)(11) (2009). Additionally, "[c]ommon sense tells us that the home inspection and meetings required the participating [person] to assess the individual characteristics and circumstances of the [child] and the [family accused of neglect]. The process must have involved [such person's] personal deliberation, decision, and judgment." *Hobbs v. N.C. Dep't of Hum. Res.*, 135 N.C. App. 412, 422, 520 S.E.2d 595, 602 (1999) (citations and internal quotation marks omitted). The director of social services has long been recognized as a public official. *See Meyer*, 347 N.C. at 112, 489 S.E.2d at 888-89 (citing *Smith v. Hefner*, 235 N.C. 1, 7, 68 S.E.2d 783, 787 (1952)). The director of social services also has the statutory authority to delegate his or her responsibilities to staff members as he or she sees fit. *See* N.C. Gen. Stat. § 108A-14(b). "This statutory language contemplates that staff members of departments of social services may be responsible for duties identified in the statute. It creates a structure under which department of social services staff members may function as public officers." *Hobbs*, 135 N.C. App. at 421, 520 S.E.2d at 602. Therefore, it is necessary to analyze the merits of each claim based on the facts and circumstances inherent in the situation. To determine whether or not Moody qualifies as a public official, her role in the investigation must be assessed to determine the level of discretion that she exercised during the investigation.

The complaint alleges that Moody is a social worker for DSS, and works under the supervision of the director of social services. Since Moody was given the task of assessing reports of child abuse, she was serving as the representative of the director of social services for Transylvania County. *See* N.C. Gen. Stat. § 108A-14(b). During her

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deposition, Moody testified that she was responsible for conducting the interview with the Hunter household and then making a decision as to what to do with the case once the interview was complete. She testified that when a case came to DSS, it was either classified as a family assessment or an investigate report. The classification would indicate the appropriate steps to be taken during the investigation, including where to conduct interviews and whom to interview. Moody testified that DSS followed the state policies and manuals with regards to classification of a report and the performance of investigations based on the classification. After an investigation was complete, the social worker would make a decision with respect to the case, including any additional action which should be taken. Moody indicated that she had the authority to reclassify a case as abuse when reports alleged neglect, based on the evidence uncovered during the course of the investigation. Carson Griffin, director of the Transylvania County DSS, also testified that the social worker conducting the investigation worked to determine what should be done with the case. Moody testified that the information used to assess the situation in a family assessment is gained from interviews with the parents, other people recommended by the parents to be interviewed, police reports, and from observation of the parents, the children, and the condition of the home. This testimony tends to show that Moody was a part of the decision-making process during the course of the investigation. The plaintiff offered evidence to show that other neighbors had information regarding the treatment and care of the children that might have changed the decision on the case, but did not refute any of Moody's evidence regarding the procedures and policies of DSS. Therefore, we conclude that Moody exercised discretion in the performance of her duties.

Nevertheless, citing *Meyer v. Walls*, 122 N.C. App. 507, 471 S.E.2d 422 (1996), *rev'd on other grounds*, 347 N.C. 97, 489 S.E.2d 880 (1997), plaintiff claims that Moody did not exercise sufficient discretion to qualify as a public official. Plaintiff's reliance is misguided. *Meyer* deals not with child protective services, but with guardianship over incompetent adults. *See id.* at 509, 471 S.E.2d at 425. The defendants in *Meyer* were responsible as the legal guardians of the decedent, who had been declared mentally incompetent. *See id.* The decedent committed suicide while under the care of the defendants, and the administrator of the estate brought a wrongful death action, claiming negligence on the part of the county social services department and those responsible for his care. *See id.* at 510, 471 S.E.2d at 425. The

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Court in *Meyer* held that the director of the county social services department, one of the legal guardians, was a public official and no suit could be maintained against him. *See id.* at 516, 471 S.E.2d at 429. The remaining defendants charged with general guardianship were all social workers for the county, and were found to not be public officials by this Court. *See id.* at 517, 471 S.E.2d at 429. However, those social workers were performing a role that was not specifically delegated to the director of social services by statute. *See* N.C. Gen. Stat. § 108A-14(b). There is no mention of the duties of the director for the care and guardianship of incompetent adults directly, similar to the direct duty to investigate cases of abuse and neglect. *See id.* Therefore, the social workers in *Meyer* were not performing a duty designated by statute, and could not function as the director's representative for that very reason. Moreover, the Supreme Court, in deciding *Meyer*, did not consider whether the defendants were public officials, because the defendants did not appeal from the holding from the Court of Appeals that determined them to be public employees. *See Meyer*, 347 N.C. at 114, 489 S.E.2d at 889-90.

In this case, based on the underlying circumstances of Moody's role at DSS and her role in the investigation, we conclude that Moody was vested with, and exercised, enough discretion consistent with those that qualify as a public official. *See Kitchin v. Halifax Cty.*, 192 N.C. App. 559, 567-69, 665 S.E.2d 760, 766-67 (2008), *disc. review denied and dismissed*, 363 N.C. 127, 673 S.E.2d 135-36 (2009); *Hobbs*, 135 N.C. App. at 420-23, 520 S.E.2d at 601-03. No genuine issue of material fact exists with regards to the claim against Moody, and therefore summary judgment is appropriate. Therefore, the claim against Moody is barred, and the judgment of the trial court must be reversed and this case remanded to the trial court for entry of summary judgment in favor of defendant Moody.

Reversed and remanded.

Judges HUNTER and HUNTER, JR. concur.

IN RE S.B.

[207 N.C. App. 741 (2010)]

IN RE S.B.

No. COA10-68

(Filed 2 November 2010)

Juveniles— disposition level—probation violation—minor offense

A juvenile level 3 disposition and commitment order following a probation violation was remanded for a new hearing and entry of a level 2 disposition and order. N.C.G.S. § 7B-2508(g) does not override the explicit directive in N.C.G.S. § 7B-2510(f) and allow the court to enter a new level 3 disposition following a probation violation based upon a minor offense.

Appeal by juvenile from disposition and commitment order entered 8 September 2009 by Judge Mary F. Covington in Davidson County Superior Court. Heard in the Court of Appeals 30 September 2010.

Attorney General Roy Cooper, by Assistant Attorney General Letitia C. Echols, for the State.

Faith S. Bushnaq for the juvenile.

ELMORE, Judge.

S.B., a minor, appeals from a level 3 disposition and commitment order based on her violation of probation. Because S.B. should not have been given a level 3 disposition, we reverse and remand to the trial court for a new disposition hearing and order.

The following facts are undisputed: S.B. was adjudicated delinquent on 14 October 2008 for resisting a public offer in violation of General Statute section 14-223. This offense is a class 2 misdemeanor. In its disposition order, the trial court indicated that S.B.'s juvenile history level was "high" and concluded as a matter of law that it "was required to order either a Level 1 disposition or a Level 2 disposition, or both." The trial court accepted, adopted, and incorporated these recommendations by the juvenile court counselor: "[S.B.] has High Risk and High Need's [*sic*]. It's our departments [*sic*] recommendation that [S.B.]'s probation be extended an additional 12 months [and] that [S.B.] and her grandmother[] continue cooperating with placement at [Old Vineyard] in Winston Salem [*sic*]. [S.B. must A]bide by prior orders of the Court."

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On 3 March 2009, S.B. was adjudicated delinquent after violating the conditions of her probation by assaulting an Old Vineyard staff member and destroying Old Vineyard property. In its 21 April 2009 disposition order, the trial court indicated that S.B.'s delinquency history level was "medium," and it concluded as a matter of law that it was "required to order either a Level 1 disposition or a Level 2 disposition, or both." The trial court accepted, adopted, and incorporated these recommendations by the juvenile court counselor: "[S.B.] has High Risk and High Need's [*sic*]. It's our departments [*sic*] recommendation that [S.B.] continue under the prior orders to the court. That [S.B.] and her grandmother both cooperate with [Multisystemic Therapy] services through Youth Villages."

On 23 June 2009, the State filed a motion for review to determine if S.B. had violated her probation. S.B. admitted to violating her probation, and the trial court entered an adjudication order on 30 June 2009. The trial court made the following conclusion of law: "Juvenile is within the jurisdiction of the Court as a delinquent juvenile and is subject to the Court's dispositional authority for having committed an offense classified under G.S. 7B-2508(a) as: minor (Class 1, 2, or 3 misdemeanor)." By order entered 30 June 2009, the trial court continued S.B.'s disposition hearing until 17 November 2009 because S.B. was scheduled to complete her treatment at Youth Villages on 7 November 2009.

On 8 September 2009, the trial court entered a juvenile Level 3 disposition and commitment order based on S.B.'s violation of probation. The trial court made the following relevant findings of fact: (1) S.B. "was previously given a Level 2 disposition and was placed on probation" and "violated the terms of probation set by the court on" 14 October 2008. (2) S.B. had "been adjudicated for [*sic*] multiple times (at least 5) along with her most recent adjudication and violation of probation of her most recent adjudication. This court has exhausted all mental health & DJJDP resources for the juvenile & the juvenile remains noncompliant." (3) "When the juvenile was adjudicated delinquent for the offense for which the juvenile was placed on probation, the juvenile had four or more prior offenses of delinquency as defined in G.S. 7B-2508(g)." The trial court ordered S.B. be committed to the Department of Juvenile Justice and Delinquency Prevention for a minimum of six months. S.B. now appeals.

S.B.'s sole argument on appeal is that the trial court violated General Statute subsections 7B-2510(e) and (f) by entering a level 3

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disposition. Section 7B-2510 governs juvenile dispositions following a probation violation. Subsections (e) and (f) state:

(e) If the court, after notice and a hearing, finds by the greater weight of the evidence that the juvenile has violated the conditions of probation set by the court, the court may continue the original conditions of probation, modify the conditions of probation, or, except as provided in subsection (f) of this section, order a new disposition at the next higher level on the disposition chart in G.S. 7B-2508. In the court's discretion, part of the new disposition may include an order of confinement in a secure juvenile detention facility for up to twice the term authorized by G.S. 7B-2508.

(f) A court shall not order a Level 3 disposition for violation of the conditions of probation by a juvenile adjudicated delinquent for an offense classified as minor under G.S. 7B-2508.

N.C. Gen. Stat. § 7B-2510(e)-(f) (2009). Here, it is undisputed that the underlying offense for which S.B. received probation is classified as a minor offense under section 7B-2508. Although the plain language of section 7B-2510(f) specifically forbids the entry of a new disposition at level 3 when the underlying offense is minor, the State argues that trial courts are authorized to do exactly that under section 7B-2508(g).

Section 7B-2508 is titled, "Dispositional limits for each class of offense and delinquency history level." It contains definitions of offense classifications and the three disposition levels as well as a chart describing the disposition levels for each class of offense and delinquency history level. That chart, found in subsection (f), states that an offense classified as "minor" combined with a delinquency history level of "high" authorizes a court to prescribe a Level 2 disposition. N.C. Gen. Stat. § 7B-2508(f) (2009). Subsection (g) provides an exception to subsection (f):

(g) Notwithstanding subsection (f) of this section, a juvenile who has been adjudicated for a minor offense may be committed to a Level 3 disposition if the juvenile has been adjudicated of four or more prior offenses. For purposes of determining the number of prior offenses under this subsection, each successive offense is one that was committed after adjudication of the preceding offense.

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N.C. Gen. Stat. § 7B 2508(g) (2009).

It is undisputed that S.B. had “been adjudicated of four or more prior offenses,” so the question at hand is whether section 7B-2508(g) overrides the explicit directive in section 7B-2510(f) and allows a trial court to enter a new level 3 disposition following violation of probation based upon a minor offense. The State argues that “a literal interpretation of this statute [*sic*] would lead to an absurd result in this case.” See *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (“[W]here a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded.”) (quotations and citation omitted).

We are unconvinced. Here, the literal interpretation of section 7B-2510(f) does not produce an absurd result. The State argues that if we do not ignore the plain language of section 7B-2510(f), we will eviscerate “the Legislature’s intent to make commitment to a youth development center an option for juveniles who have repeatedly broken the law in spite of multiple attempts at rehabilitation.” If this were true, such a result would be absurd. However, the acts underlying S.B.’s probation violations could each form the basis of a new offense. For example, court records indicate that S.B. was caught in possession of marijuana, assaulted an Old Vineyard staff member, and damaged property belonging to Old Vineyard. Each of these actions could form the basis of a new adjudication order. If S.B. is adjudicated for a minor offense, section 7B-2508(g) authorizes a trial court to commit S.B. to a Level 3 disposition based upon her adjudication of four or more prior offenses. That the State cannot reach this result via a probation violation does not render a literal reading of 7B-2510(f) absurd.

Accordingly, we reverse the 8 September 2009 juvenile level 3 disposition and commitment order and remand the matter to the district court for a new disposition hearing, if necessary, and entry of a juvenile level 2 disposition and order.

Reversed and remanded.

Judges JACKSON and THIGPEN concur.

IN RE B.G.

[207 N.C. App. 745 (2010)]

IN THE MATTER OF: B.G.

No. COA10-168

(Filed 2 November 2010)

Child Abuse, Dependency, and Neglect— appeal from permanency planning order—age of majority

An appeal from a permanency planning order was dismissed as moot where the child had reached the age of majority.

Appeal by respondent-father from order entered 2 December 2009 by Judge James T. Hill in Durham County District Court. Heard in the Court of Appeals 2 August 2010.

Deputy County Attorney Thomas W. Jordan, Jr., for petitioner-appellee Durham County Department of Social Services.

Poyner Spruill LLP, by John W. O'Hale, for guardian ad litem.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Annick Lenoir-Peek, for respondent-appellant father.

STEELMAN, Judge.

Where B.G. has reached the age of majority, the trial court no longer has jurisdiction over this matter and Father's arguments are rendered moot.

I. Factual and Procedural Background

B.G. was born in October 1992. Father gained custody of B.G. in 1997, and cared for her until 2001, when he was convicted of assault and had to serve a six-month sentence in jail. B.G.'s mother, who is not a party to this appeal, gained custody of B.G. and cared for her until 2005. The history of this case since 2005, is found in our prior opinion in *In re B.G.*, 191 N.C. App. 399, 663 S.E.2d 12 (2008) (unpublished) (*B.G. I*) and is not repeated. On 11 October 2007, the trial court entered a permanency planning order concluding that it was in the best interests of B.G. to continue in the physical custody of her maternal aunt and uncle and that she be placed in joint legal custody with Father and her aunt and uncle. B.G. was to have a structured plan of visitation with Father. DSS and B.G.'s guardian *ad litem* were relieved of their duties and the case was removed from the active juvenile docket. Father appealed.

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[207 N.C. App. 745 (2010)]

On review, this Court reversed the permanency planning order and remanded for further findings of fact pursuant to N.C. Gen. Stat. § 7B-907, and to determine whether respondent had properly raised a constitutional issue, which could not be resolved by appellate review as the recording device had failed to record the hearing. *Id.* On 8 October 2008, the trial court entered a new order with additional findings of fact, but reached the same conclusions as in the 11 October 2007 order. Father appealed from the new order.

In an opinion filed 16 June 2009, we affirmed the order in part and reversed and remanded in part. *In re B.G.*, — N.C. App. —, 677 S.E.2d 549 (2009) (*B.G. II*). We determined that the trial court had erred in balancing the constitutional rights of Father against the best interests of the child without first determining that Father was either unfit or that he acted inconsistently with his constitutional right to parent. *Id.* at —, 677 S.E.2d at 552. This Court stated, “[a]lthough there may be evidence in the record to support a finding that [Father] acted inconsistently with his custodial rights, it is not the duty of this Court to issue findings of fact.” *Id.* This Court reversed the order of the trial court and remanded for reconsideration with an instruction “to carefully revisit the custody issue in light of the principles of law articulated in this opinion[,]” given the “gravity of the constitutional right involved in this case[.]” *Id.* at —, 677 S.E.2d at 554.

A new hearing was held on 28 August 2009. The trial court determined that it would make new findings of fact based on the existing record after hearing arguments from counsel. At the hearing, Father argued that it was in the best interests of B.G. to move to Greensboro to live with him during her senior year of high school.

On 2 December 2009, the trial court entered an order in which it concluded that Father had acted inconsistently with his constitutionally protected right to custody and that it was in the best interests of B.G. that she be placed in the joint legal custody of Father and her maternal aunt and uncle, with primary physical custody being with the aunt and uncle, who resided in Durham. Father appeals.

II. Mootness

In October¹ 2010, B.G. reached the age of majority. Jurisdiction in juvenile cases is retained by the trial court “until terminated by order of the court or until the juvenile reaches the age of 18 years or is

1. The exact birth date of B.G. is not included in the record on appeal to protect the juvenile's identity.

IN RE B.G.

[207 N.C. App. 745 (2010)]

otherwise emancipated, whichever occurs first.” N.C. Gen. Stat. § 7B-201 (2009). Even if we were to find that the trial court’s order was deficient and reversed and remanded the case for further proceedings, the trial court would lack jurisdiction to enter any subsequent orders pertaining to B.G. This Court has stated:

“A case is ‘moot’ when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.” *Roberts v. Madison County Realtors Ass’n*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996). Further, “[w]henever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law.” *Dickerson Carolina, Inc. v. Harrelson*, 114 N.C. App. 693, 697, 443 S.E.2d 127, 131, *disc. review denied*, 337 N.C. 691, 448 S.E.2d 520 (1994) (internal quotation marks omitted).

In re Stratton, 159 N.C. App. 461, 463, 583 S.E.2d 323, 324, *appeal dismissed*, 357 N.C. 506, 588 S.E.2d 472 (2003). Father’s arguments on appeal have been rendered moot. This appeal must be dismissed.

DISMISSED.

Judges STEPHENS and ERVIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 2 NOVEMBER 2010)

| | | |
|--|---------------------------------|--|
| CARPENTER v. CREWS No. 10-362 | Forsyth (08CVS7731) | Dismissed |
| GARRETT v. BURRIS No. 09-1662 | Iredell (08CVD1552) | Dismissed |
| GAYNOR v. GAYNOR No. 09-1675 | Pitt (08CVD2513) | Dismissed |
| HAYES v. TIME WARNER CABLE, INC. No. 10-44 | Durham (08CVS1889) | Dismissed |
| HUGHES v. CRADDOCK No. 10-266 | Randolph (09CVS1812) | Affirmed in part; Reversed in part |
| IN RE C.W. & D.H. No. 10-385 | Wayne (04JT231) (04JT234) | Affirmed |
| IN RE M.I.M. No. 10-539 | Lee (09J71) | Reversed and Remanded |
| IN RE M.L. No. 10-508 | New Hanover (09JA72) | Reversed and Remanded |
| IN RE N.P. & S.P. No. 10-587 | Harnett (08J116-117) | Affirmed |
| IN RE Q.L.D. No. 10-513 | Catawba (08JT263) | Affirmed |
| INFORZATO v. MAI HEALTHCARE, INC. No. 10-269 | Indust. Comm. (502682) | Appeal dismissed |
| JOBE v. TOWN OF HAW RIVER No. 10-183 | Alamance (08CVS3294) | Reversed |
| JOHNSON v. CAUSEY No. 09-1712 | New Hanover (08CVS2069) | Reversed in part and affirmed in part |
| KEATON v. KEATON No. 09-1672 | Rowan (08CVD410) | Affirmed |

| | | |
|------------------------------------|--|---|
| PEREZ v. CLARK No. 10-49 | Indust. Comm. (440919) | Reversed and Remanded |
| RODRIGUES v. S. ASSISTED LIVING | Union (09CVS274) | Affirmed |
| STATE v. BULLOCK No. 10-320 | Durham (07CRS50838) | No reversible error |
| STATE v. CONRAD No. 10-234 | Forsyth (08CRS60166) | No Error |
| STATE v. DAVIS No. 10-118 | Caldwell (07CRS51945) | Defendant received a fair trial, free of error |
| STATE v. DERBYSHIRE No. 10-205 | Wake (06CRS101768) | Remanded |
| STATE v. FREEMAN No. 10-380 | Brunswick (08CRS55236) (08CRS6058) | Vacated and remanded |
| STATE v. HANCOCK No. 10-311 | Davidson (04CRS1343-44) | Affirmed |
| STATE v. HICKS No. 10-247 | Buncombe (09CRS406) | No Error |
| STATE v. HOOKER No. 10-437 | Lenoir (08CRS1299) (06CRS700394) | Reversed and Remanded |
| STATE v. KELLY No. 09-1598 | Wayne (07CRS1251) (06CRS57862-63) | Affirmed |
| STATE v. KOTECKI No. 10-260 | Brunswick (08CRS52430) | No Error |
| STATE v. LOWRY No. 10-165 | Mecklenburg (08CRS65524) (08CRS237200-201) | No Error |
| STATE v. LUKE No. 10-169 | Buncombe (09CRS356) (09CRS56115-16) | Remanded for new sentencing hearing |
| STATE v. PRUITT No. 10-263 | Rockingham (07CRS4394) (07CRS2950) | Affirmed |

| | | |
|---|---|----------------------|
| STATE v. REESE No. 10-377 | Guilford (08CRS23202) | No Error |
| STATE v. SMITH No. 10-393 | Mecklenburg (09CRS11127) (09CRS572-574) | No Error |
| STATE v. TILLMAN No. 10-340 | Moore (08CRS55858) | No Error |
| STATE v. WALLACE No. 10-4 | Cabarrus (08CRS8718-19) (07CRS51700) | No prejudicial error |
| STATE v. WATKINS No. 10-296 | Wake (07CRS75096) (07CRS60136) | Affirmed |
| STATE v. WHITTINGTON No. 10-310 | Watauga (08CRS50811) (08CRS2241) | No Error |
| SUPERIOR CONSTR. v. INTRACOASTAL LIVING No. 09-1543 | Brunswick (07CVS2806) | Dismissed |

APPENDICES

**ORDER ADOPTING AMENDMENT TO THE
NORTH CAROLINA RULES OF APPELLATE
PROCEDURE**

**JUDICIAL STANDARDS COMMISSION
ADVISORY OPINION: QUASI-JUDICIAL
ACTIVITIES**

**AMENDMENTS TO THE RULES AND
REGULATIONS OF THE NORTH CAROLINA
STATE BAR CONCERNING MEMBERSHIP**

**AMENDMENTS TO THE RULES AND
REGULATIONS OF THE NORTH CAROLINA
STATE BAR CONCERNING REINSTATEMENT**

**AMENDMENTS TO THE RULES AND
REGULATIONS OF THE NORTH CAROLINA
STATE BAR CONCERNING IOLTA**

**AMENDMENTS TO THE RULES AND
REGULATIONS OF THE NORTH CAROLINA
STATE BAR CONCERNING
LEGAL SPECIALIZATION**

AMENDMENTS TO THE RULES AND
REGULATIONS OF THE NORTH CAROLINA
STATE BAR CONCERNING
PREPAID LEGAL SERVICES PLANS

RIULES OF APPELLATE PROCEDURE

IN THE SUPREME COURT OF NORTH CAROLINA

ORDER ADOPTING AMENDMENT TO THE
NORTH CAROLINA RULES OF APPELLATE PROCEDURE

Rule 25 of the North Carolina Rules of Appellate Procedure is hereby amended as described below:

Rule 25(b) is amended to read as follows:

(b) **Sanctions for Failure to Comply with Rules.** A court of the appellate division may, on its own initiative or motion of a party, impose a sanction against a party or attorney or both when the court determines that such a party or attorney or both substantially failed to comply with these appellate rules, including failure to pay any filing or printing fees or costs when due. The court may impose sanctions of the type and in the manner prescribed by Rule 34 for frivolous appeals.

This amendment to the North Carolina Rules of Appellate Procedure shall be effective on 15 March 2012.

This amendment shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. These amendments also shall be published as quickly as practicable on the North Carolina Judicial Branch of Government Home Page (<http://www.nccourts.org/>).

s/Jackson, J.
For the Court

JUDICIAL STANDARDS COMMISSION ADVISORY OPINIONS

**CITE AS: QUASI-JUDICIAL ACTIVITIES
FORMAL ADVISORY OPINION: 2011-03**

July 8, 2011

Refer to 207 N.C. App. 754

QUESTION:

May a judge serve as a mentor in the North Carolina Bar Association's (NCBA) mentorship program?

The NCBA mentorship program offers two types of mentorship opportunities, traditional and situational. Traditional mentoring contemplates the conventional model of a one-on-one, long-term relationship between a new lawyer and an experienced lawyer whereby a broad spectrum of topics may be discussed. With situational mentoring, a new lawyer is referred to an experienced lawyer for immediate advice on a particular issue.

COMMISSION CONCLUSION:

The Judicial Standards Commission determined judges should not participate as mentors in the North Carolina Bar Association's mentorship program, neither as traditional nor situational mentors.

DISCUSSION:

The Commission reasoned that while judges are permitted and even encouraged to informally discuss issues of professionalism, ethics and decorum with new attorneys, there are many Canons of the North Carolina Code of Judicial Conduct which are problematic with service as a mentor to new attorneys. Canon 5G of the Code provides that a judge may not practice law, which would include providing legal advice to an attorney. The attorney could then use the judge's advice in the representation of a client, thereby creating a situation whereby a judge had indirectly provided legal advice to a litigant. It is reasonable to anticipate that the attorney would inform his client that the attorney had consulted with the judge in an effort to boost the attorney's credibility or allay his client's apprehension. The mentoring conduct would then violate Canon 2B of the Code which provides that a judge may not lend the prestige of his/her judicial office to promote the private interests of others nor convey or permit others to convey the impression that they are in a special position to influence a judge.

Participation in the mentor program will also raise disqualification issues under Canon 3C(1) of the Code for the judge in matters in which the mentee attorney appears as counsel of record. Canon 2A of the Code requires conduct which promotes public confidence in the integrity and impartiality of the judiciary, while Canon 4 contains the proviso that a judge should not participate in quasi-judicial activities which cast substantial doubt on the judge's impartiality.

While judges should not participate as mentors in the NCBA mentorship program or otherwise serve as a mentor for an attorney, judges are strongly encouraged to mentor new judges and otherwise provide disinterested expert advice on the law upon the request of another judge. It should also be noted that Canons 4A and 5A of the Code provide that judges "may write, lecture, teach and speak on legal or non-legal subjects", however such activities are more appropriately suited for public or classroom venues.

References:

North Carolina Code of Judicial Conduct

Canon 2A

Canon 2B

Canon 3C(1)

Canon 4

Canon 5G

**AMENDMENTS TO THE RULES AND REGULATIONS
OF THE NORTH CAROLINA STATE BAR
CONCERNING MEMBERSHIP**

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 27, 2012.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning membership, as particularly set forth in 27 N.C.A.C. 1A, Section .0200, be amended by adding the following rule.

**27 N.C.A.C. 1A, Organization of the North Carolina State Bar,
Section .0200 Membership—Annual Membership Fees**

.0204 “Good Standing” Definition and Certificates

(a) Definition

A lawyer who is an active member of the North Carolina State Bar and who is not subject to a pending administrative or disciplinary suspension or disbarment order or an order of suspension that has been stayed is in good standing with the North Carolina State Bar. An administrative or disciplinary suspension or disbarment order is “pending” if the order has been announced in open court by a state court of competent jurisdiction or by the Disciplinary Hearing Commission, or if the order has been entered by a state court of competent jurisdiction, by the Council or by the Disciplinary Hearing Commission but has not taken effect. “Good standing” makes no reference to delinquent membership obligations, prior discipline, or any disciplinary charges or grievances that may be pending.

(b) Certificate of Good Standing for Active Member

Upon application and payment of the prescribed fee, the Secretary of the North Carolina State Bar shall issue a certificate of good standing to any active member of the State Bar who is in good standing and who is current on all payments owed to the North Carolina State Bar. A certificate of good standing will not be issued unless the member pays any delinquency shown on the financial records of the North Carolina State Bar including outstanding judicial district bar dues. If the member contends that there is good cause for non-payment of some or all of the amount owed, the member may subsequently demonstrate good cause to the Administrative Committee pursuant to the procedure set forth in Rule .0903(e)(1) of subchapter 1D of these rules. If the member shows good cause, the contested amount shall be refunded to the member.

(c) Certificate of Good Standing for Inactive Member

Upon application, the Secretary of the North Carolina State Bar shall issue a certificate of good standing to any inactive member of the State Bar who was in good standing at the time that the member was granted inactive status and who is not subject to any disciplinary order or pending disciplinary order. The certificate shall state that the member is inactive and is ineligible to practice law in North Carolina.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 27, 2012.

Given over my hand and the Seal of the North Carolina State Bar, this the 16th day of February, 2012.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 8th day of March, 2012.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 8th day of March, 2012.

s/Jackson, J.
For the Court

**AMENDMENTS TO THE RULES AND REGULATIONS
OF THE NORTH CAROLINA STATE BAR
CONCERNING REINSTATEMENT**

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 27, 2012.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning reinstatement from inactive status, as particularly set forth in 27 N.C.A.C. 1D, Section .0900, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Rules of the Standing Committees of the North Carolina State Bar, Section .0900 Procedures for Administrative Committee

.0902 Reinstatement from Inactive Status

(a) Eligibility to Apply for Reinstatement

Any member who has been transferred to inactive status may petition the council for an order reinstating the member as an active member of the North Carolina State Bar.

(b) Definition of "Year".

As used in this rule, a year is a 365 day period of time unless a calendar year is specified.

~~(b) (c) Contents of Reinstatement Petition Requirements for Reinstatement. The petition shall set out facts showing the following:~~

(1) Completion of Petition.

~~that the~~ The member has provided ~~must provide~~ all the information requested ~~in an application~~ on a petition form prescribed by the council and ~~has signed~~ must sign the form petition under oath;.

(2) CLE Requirements for Calendar Year Before Inactive.

~~unless~~ Unless the member was exempt from such requirements pursuant to Rule .1517 of this subchapter or is subject to the requirements in paragraph ~~(b) (c)~~ (6) of this rule, ~~that~~ the member ~~satisfied~~ must satisfy the minimum continuing legal education requirements, as set forth in Rule .1518 of this subchapter, for the calendar year immediately preceding the

calendar year in which the member was transferred to inactive status, (the “subject year”), including any deficit from a prior calendar year that was carried forward and recorded in the member’s CLE record for the subject year^{7,2}.

(3) Character and Fitness to Practice.

~~that the~~ The member ~~has~~ must have the moral qualifications, competency and learning in the law required for admission to practice law in the state of North Carolina, and must show that the member’s resumption of the practice of law within this state will be neither detrimental to the integrity and standing of the Bar or the administration of justice nor subversive of the public interest^{7,2}.

(4) CLE Requirements For Members Granted Inactive Status Prior to March 10, 2011.

~~[this provision shall be effective~~ Effective for all members who are transferred to inactive status on or after January 1, 1996, through ~~the effective date of these amendments~~ March 9, 2011.] ~~if~~ If more than 2 years (as used in this rule, ~~a year is measured in 12 month increments and does not refer to a calendar year~~) have elapsed between the date of the entry of the order transferring the member to inactive status and the date the petition is filed, ~~that within one year prior to filing the petition,~~ the member ~~completed~~ must complete 15 hours of continuing legal education (CLE) approved by the Board of Continuing Legal Education pursuant to Rule .1519 of this subchapter. Of the required 15 CLE hours, 3 hours must be earned by attending courses in the areas of professional responsibility and/or professionalism^{7,2}. The CLE hours must be completed within one year prior to the filing of the petition.

(5) CLE Requirements If Inactive Less Than 7 Years.

~~[this provision shall be effective~~ Effective for all members who are transferred to inactive status on or after ~~the effective date of these amendments~~ March 10, 2011.] ~~if~~ If more than 1 but less than 7 years have elapsed between the date of the entry of the order transferring the member to inactive status and the date that the petition is filed, ~~that during the period of inactivity and within 2 years prior to filing the petition,~~ the member ~~has completed~~ must complete 12 hours of approved CLE for each year that the member was inactive. The CLE

hours must be completed within 2 years prior to filing the petition. For each 12-hour increment, 4 hours may be taken online; 2 hours must be earned by attending courses in the areas of professional responsibility and/or professionalism; and 5 hours must be earned by attending courses determined to be practical skills courses by the Board of Continuing Legal Education or its designee; ~~provided, if~~ if during the period of inactivity the member complied with mandatory CLE requirements of another state where the member is licensed, those CLE credit hours may be applied to the requirements under this provision;.

(6) Bar Exam Requirement If Inactive 7 or More Years.

~~[this provision shall be effective~~ Effective for all members who are transferred to inactive status on or after ~~the effective date of these amendments~~ March 10, 2011.] ~~if~~ if 7 years or more have elapsed between the date of the entry of the order transferring the member to inactive status and the date that the petition is filed, the member ~~has obtained~~ must obtain a passing grade on a regularly scheduled North Carolina bar examination; ~~provided, each.~~

(A) Active Licensure in Another State. Each year of active licensure in another state during the period of inactive status shall offset one year of inactive status for the purpose of calculating the 7 years necessary to actuate this provision. If the member is not required to pass the bar examination as a consequence of offsetting, the member shall satisfy the CLE requirements set forth in paragraph (c)(5) for each year that the member was inactive.

(B) Military Service. Each calendar year in which an inactive member served on full-time, active military duty, whether for the entire calendar year or some portion thereof, shall offset one year of inactive status for the purpose of calculating the 7 years necessary to actuate the requirement of this paragraph. If the member is not required to pass the bar examination as a consequence of offsetting, the member shall satisfy the CLE requirements set forth in paragraph (c)(5).

(7) Payment of Fees, Assessments and Costs.

~~that the~~ The member has paid must pay all of the following:

- (A) a \$125.00 reinstatement fee;
- (B) the membership fee, and Client Security Fund assessment and the judicial surcharge for the year in which the application is filed;
- (C) the annual membership fee, if any, of the member's district bar for the year in which the application is filed and any past due annual membership fees for any district bar with which the member was affiliated prior to transferring to inactive status;
- (D) all attendee fees owed the Board of Continuing Legal Education for CLE courses taken to satisfy the requirements of ~~Rule .0002(b)(2) and (4)~~ paragraphs (c)(2), (4), and (5);
- (E) any costs previously assessed against the member by the chairperson of the Grievance Committee, the Disciplinary Hearing Commission; and/or the secretary or council of the North Carolina State Bar; and
- (F) all costs incurred by the North Carolina State Bar in investigating and processing the application for reinstatement.

~~The reinstatement fee, costs, and any past due district bar annual membership fees shall be retained; however, the State Bar and district bar membership fees assessed for the year in which the application is filed shall be refunded if the petition is denied.~~

(d) (c) Service of Reinstatement Petition....

[re-lettering paragraphs (d) through (g)]

(i) Denial of Petition.

When a petition for reinstatement is denied by the council in a given calendar year, the member may not petition again until the following calendar year. The reinstatement fee, costs, and any fees paid pursuant to paragraph (c)(7) shall be retained.

However, the State Bar membership fee, Client Security Fund assessment, judicial surcharge and district bar membership fee assessed for the year in which the application is filed shall be refunded.

~~.0904 Compliance Reinstatement from After Suspension for Failure to Fulfill Obligations of Membership~~

(a) ~~Reinstatement~~ Compliance Within 30 Days of Service of Suspension Order.

A member who receives an order of suspension for failure to comply with an obligation of membership may preclude the order from becoming effective and shall not be required to file a formal reinstatement petition or pay the reinstatement fee by submitting a written request and satisfactory showing if the member shows within 30 days after service of the suspension order that the member has ~~complied with or fulfilled~~ done the following:

- (1) fulfilled the obligations of membership set forth in the order;
and
- (2) ~~has paid the costs of the suspension and reinstatement procedure~~ administrative fees associated with the issuance of the suspension order; including the costs of service;
- (3) paid any other delinquency shown on the financial records of the State Bar including outstanding judicial district bar dues;
- (4) signed and filed CLE annual report forms as required by Rule .1522 of this subchapter;
- (5) completed CLE hours as required by Rules .1518 and .1522 of this subchapter; and
- (6) filed any IOLTA certification required by Rule .1319 of this subchapter. Such member shall not be required to file a formal reinstatement petition or pay the reinstatement fee.

(b) Reinstatement More than 30 Days after Service of Suspension Order.

At any time more than 30 days after service of an order of suspension on a member, a member who has been suspended for failure to com-

ply with an obligation of membership may petition the council for an order of reinstatement.

(c) Definition of "Year".

As used in this rule, a year is a 365 day period of time unless a calendar year is specified.

~~(e) (d) Requirements for Reinstatement Petition. The petition shall set out facts showing the following:~~

(1) Completion of Petition.

~~that the~~ The member has provided must provide all the information requested in a on a petition form prescribed by the council and has signed must sign the form petition under oath;.

(2) CLE Requirements for Calendar Years Before Suspended.

~~unless~~ Unless the member was exempt from such requirements pursuant to Rule .1517 of this subchapter or is subject to the requirements in paragraph (e)(d)(4) of this rule, that the member satisfied must satisfy the minimum continuing legal education (CLE) requirements, as set forth in Rule .1518 of this subchapter, for the calendar year immediately preceding the year in which the member was suspended (the "subject year"), including any deficit from a prior year that was carried forward and recorded in the member's CLE record for the subject year;. The member shall also sign and file any delinquent CLE annual report form.

(3) CLE Requirement If Suspended Less Than 7 Years.

~~if~~ If more than 1 but less than 7 years (as used in this rule, a year is measured in 12 month increments and does not refer to a calendar year) have elapsed between the effective date of the suspension order and the date upon which the reinstatement petition is filed, that during the period of suspension and within 2 years prior to filing the petition, the member has completed must complete 12 hours of approved CLE for each year that the member was suspended. The CLE must be completed within 2 years prior to filing the petition. For each 12-hour increment, 4 hours may be taken online; 2 hours must be earned by attending courses in the areas of professional responsibility and/or professionalism; and 5 hours must be

earned by attending courses determined to be practical skills courses by the Board of Continuing Legal Education or its designee; ~~provided, if~~ If during the period of suspension the member complied with mandatory CLE requirements of another state where the member is licensed, those CLE credit hours may be applied to the requirements under this provision;.

(4) Bar Exam Requirement If Suspended 7 or More Years.

~~if~~ If 7 years or more have elapsed between the effective date of the suspension order and the date that the petition is filed, the member ~~has obtained~~ must obtain a passing grade on a regularly scheduled North Carolina bar examination; ~~pro-~~
~~vided, each.~~

(A) Active Licensure in Another State. Each year of active licensure in another state during the period of suspension shall offset one year of suspension for the purpose of calculating the 7 years necessary to actuate this provision. If the member is not required to pass the bar examination as a consequence of offsetting, the member shall satisfy the CLE requirements set forth in paragraph (d)(3) for each year that the member was suspended.

(B) Military Service. Each calendar year in which a suspended member served on full-time, active military duty, whether for the entire calendar year or some portion thereof, shall offset one year of suspension for the purpose of calculating the 7 years necessary to actuate the requirement of this paragraph. If the member is not required to pass the bar examination as a consequence of offsetting, the member shall satisfy the CLE requirements set forth in paragraph (d)(3).

(5) Character and Fitness to Practice.

~~that the~~ The member ~~has~~ must have the moral qualifications, competency and learning in the law required for admission to practice law in the state of North Carolina, and must show that the member's resumption of the practice of law will be neither detrimental to the integrity and standing of the Bar or the administration of justice nor subversive of the public interest;.

(6) Payment of Fees, Assessments and Costs.

~~that the~~ The member has paid must pay all of the following:

- (A) a \$125.00 reinstatement fee or \$250.00 reinstatement fee if suspended for failure to comply with CLE requirements;
- (B) all membership fees, Client Security Fund assessments, judicial surcharges and late fees owed at the time of suspension and owed for the year in which the reinstatement petition is filed;
- (C) all district bar annual membership fees owed at the time of suspension and owed for the year in which the reinstatement petition is filed;
- (D) all attendee fees, fines and penalties owed the Board of Continuing Legal Education at the time of suspension and attendee fees for CLE courses taken to satisfy the requirements of ~~Rule .0004(e)~~ paragraphs (d)(2) and (3) above;
- (E) any costs assessed against the member by the chairperson of the Grievance Committee, the Disciplinary Hearing Commission, and/or the secretary or council of the North Carolina State Bar; and
- (F) all costs incurred by the North Carolina State Bar in suspending the member, including the costs of service, and in investigating and processing the application for reinstatement.

(7) Pro Hac Vice Registration Statements.

~~that the~~ The member has filed must file any overdue pro hac vice registration statement for which the member was responsible; ~~and~~

(8) IOLTA Certification.

The member must complete any IOLTA certification required by Rule .1319 of this subchapter.

~~(8)~~ (9) Wind Down of Law Practice During Suspension.

~~that, during the 30 day period after the effective date of the order of suspension, the~~ The member must demonstrate that the mem-

ber fulfilled the obligations of a disbarred or suspended member set forth in Rule .0124 of Subchapter 1B; during the 30 day period after the effective date of the order of suspension, or that such obligations do not apply to the member due to the nature of the member's legal employment.

(e) ~~(d)~~ Procedure for Review of Reinstatement Petition.

....

[re-lettering paragraphs (e) and (f)]

(h) Denial of Petition.

When a petition for reinstatement is denied by the council in a given calendar year, the member may not petition again until the following calendar year. The reinstatement fee, costs, and any fees paid pursuant to paragraph (d)(6) shall be retained. However, the State Bar membership fee, Client Security Fund assessment, judicial surcharge and district bar membership fee assessed for the year in which the application is filed shall be refunded.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 27, 2012.

Given over my hand and the Seal of the North Carolina State Bar, this the 16th day of March, 2012.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 8th day of March, 2012.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 8th day of March, 2012.

s/Jackson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING IOLTA

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 21, 2011.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning IOLTA, as particularly set forth in 27 N.C.A.C. 1D, Section .1300, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Rules of the Standing Committees of the North Carolina State Bar, Section .1300, Rules Governing the Administration of the Plan for Interest on Lawyers' Trust Accounts (IOLTA)

.1301 Purpose

The IOLTA Board of Trustees (board) shall carry out the provisions of the Plan for Interest on Lawyers' Trust Accounts and administer the IOLTA program (NC IOLTA). Any funds remitted to the North Carolina State Bar from banks by reason of interest earned on general trust accounts established by lawyers pursuant to Rule 1.15-2(b) of the Rules of Professional Conduct or interest earned on trust or escrow accounts maintained by settlement agents pursuant to N.C.G.S. 45A-9 shall be deposited by the North Carolina State Bar through the board in a special account or accounts which shall be segregated from other funds of whatever nature received by the State Bar.

....

.1312 Source of Funds

Funding for the program carried out by the board shall come from funds remitted from depository institutions by reason of interest earned on trust accounts established by lawyers pursuant to Rule 1.15 of the Rules of Professional Conduct and Rule .1316 of this subchapter or interest earned on trust or escrow accounts maintained by settlement agents pursuant to N.C.G.S. 45A-9; voluntary contributions from lawyers; and interest, dividends, or other proceeds earned on the board's funds from investments or from other sources intended for the provision of legal services to the indigent and the improvement of the administration of justice.

.1316 IOLTA Accounts

(a) IOLTA Account Defined. Pursuant to order of the North Carolina Supreme Court, every general trust account, as defined in the Rules

of Professional Conduct, must be an interest or dividend-bearing account. (As used herein, “interest” shall refer to both interest and dividends.) Funds deposited in a general, interest-bearing trust account must be available for withdrawal upon request and without delay (subject to any notice period that the bank is required to reserve by law or regulation). Additionally, pursuant to N.C.G.S. 45A-9, a settlement agent who maintains a trust or escrow account for the purposes of receiving and disbursing closing funds and loan funds shall direct that any interest earned on funds held in that account be paid to the NC State Bar to be used for the purposes authorized under the Interest on Lawyers’ Trust Account Program according to rule .1316(d) below. For the purposes of these rules, all such accounts shall be known as “IOLTA Accounts” (also referred to as “Accounts”).

(b) Eligible Banks. Lawyers may maintain one or more IOLTA Account(s) only at banks and savings and loan associations chartered under North Carolina or federal law, as required by Rule 1.15 of the Rules of Professional Conduct, that offer and maintain IOLTA Accounts that comply with the requirements set forth in this subchapter (Eligible Banks). Settlement agents shall maintain any IOLTA Account as defined by N.C.G.S. 45A-9 and Rule .1316(a) above only at an Eligible Bank. The determination of whether a bank is eligible shall be made by NC IOLTA, which shall maintain a list of participating Eligible Banks available to all members of the State Bar and to all settlement agents. A bank that fails to meet the requirements of this subchapter shall be subject only to termination of its eligible status by NC IOLTA. A violation of this rule shall not be the basis for civil liability.

(c) Notice Upon Opening or Closing IOLTA Account. Every lawyer/, ~~or~~ law firm, or settlement agent maintaining IOLTA Accounts shall advise NC IOLTA of the establishment or closing of each IOLTA Account. Such notice shall include (i) the name of the bank where the account is maintained, (ii) the name of the account, (iii) the account number, and (iv) the name and bar number of the lawyer(s) in the firm and/or the name(s) of any non-lawyer settlement agent(s) maintaining the account. The North Carolina State Bar shall furnish to each lawyer/, ~~or~~ law firm, or settlement agent maintaining an IOLTA Accounts a suitable plaque explaining the program, which plaque shall be exhibited in the office of the lawyer/, ~~or~~ law firm, or settlement agent.

(d) Directive to Bank. Every lawyer or law firm and every settlement agent maintaining a North Carolina IOLTA Account shall direct any bank in which an IOLTA Account is maintained to:

- (1) remit interest, less any deduction for allowable reasonable bank service charges or fees, (as used herein, “service charges” shall include any charge or fee charged by a bank on an IOLTA Account) as defined in paragraph (e), at least quarterly to NC IOLTA;
- (2) transmit with each remittance to NC IOLTA a statement showing for each account: (i) the name of the law firm/, ~~or~~ lawyer, or settlement agent maintaining the account, (ii) the lawyer’s/, ~~or~~ law firm’s, or settlement agent’s IOLTA Account number, (iii) the earnings period, (iv) the average balance of the account for the earnings period, (v) the type of account, (vi) the rate of interest applied in computing the remittance, (vii) the amount of any service charges for the earnings period, and (viii) the net remittance for the earnings period; and
- (3) transmit to the law firm/, ~~or~~ lawyer, or settlement agent maintaining the account a report showing the amount remitted to NC IOLTA, the earnings period, and the rate of interest applied in computing the remittance.

(e) Allowable Reasonable Service Charges. Eligible Banks may elect to waive any or all service charges on IOLTA Accounts. If a bank does not waive service charges on IOLTA Accounts, allowable reasonable service charges may be assessed but only against interest earned on the IOLTA Account or funds deposited by the lawyer/, ~~or~~ law firm, or settlement agent in the IOLTA Account for the purpose of paying such charges. Allowable reasonable service charges may be deducted from interest on an IOLTA Account only at the rates and in accordance with the bank’s standard practice for comparable non-IOLTA accounts....

.1318 Confidentiality

(a) As used in this rule, “confidential information” means all information regarding IOLTA account(s) other than (1) a lawyer’s/, ~~or~~ law firm’s, or settlement agent’s status as a participant, former participant, or non-participant in NC IOLTA, and (2) information regarding the policies and practices of any bank in respect of IOLTA trust

accounts, including rates of interest paid, service charge policies, the number of IOLTA accounts at such bank, the total amount on deposit in all IOLTA accounts at such bank, the total amounts of interest paid to NC IOLTA, and the total amount of service charges imposed by such bank upon such accounts.

(b) Confidential information shall not be disclosed by the staff or trustees of NC IOLTA to any person or entity, except that confidential information may be disclosed (1) to any chairperson of the Grievance Committee, staff attorney, or investigator of the North Carolina State Bar upon his or her written request specifying the information requested and stating that the request is made in connection with a grievance complaint or investigation regarding one or more trust accounts of a lawyer/ ~~or~~ law firm, or settlement agent; or (2) in response to a lawful order or other process issued by a court of competent jurisdiction, or a subpoena, investigative demand, or similar notice issued by a federal, state, or local law enforcement agency.

.1319 Certification

Every lawyer admitted to practice in North Carolina shall certify annually on or before June 30 to the North Carolina State Bar that all general trust accounts maintained by the lawyer or his or her law firm are established and maintained as IOLTA accounts as prescribed by Rule 1.15 of the Rules of Professional Conduct and Rule .1316 of this subchapter or that the lawyer is exempt from this provision because he or she does not maintain any general trust account(s) for North Carolina client funds. Any lawyer acting as a settlement agent who maintains a trust or escrow account used for the purpose of receiving and disbursing closing and loan funds shall certify annually on or before June 30 to the North Carolina State Bar that such accounts are established and maintained as IOLTA accounts as prescribed by N.C.G.S. 45A-9 and Rule .1316 of this subchapter.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 21, 2011.

Given over my hand and the Seal of the North Carolina State Bar,
this the 16th day of February, 2012.

s/ L. Thomas Lunsford, II

L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 8th day of March, 2012.

s/Sarah Parker

Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 8th day of March, 2012.

s/Jackson, J.

For the Court

**AMENDMENTS TO THE RULES AND REGULATIONS OF THE
NORTH CAROLINA STATE BAR CONCERNING
LEGAL SPECIALIZATION**

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 21, 2011.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning legal specialization, as particularly set forth in 27 N.C.A.C. 1D, Section .1700, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Rules of the Standing Committees of the North Carolina State Bar, Section .1700 The Plan of Legal Specialization

.1720 Minimum Standards for Certification of Specialists

(a) To qualify for certification as a specialist, a lawyer applicant must pay any required fee, comply with the following minimum standards, and meet any other standards established by the board for the particular area of specialty.

(1)

(4) The applicant must make a satisfactory showing, as determined by the board after advice from the appropriate specialty committee, of qualification in the specialty through peer review by providing, as references, the names of at least five lawyers, all of whom are licensed and currently in good standing to practice law in this state, or in any state, or judges, who are familiar with the competence and qualification of the applicant as a specialist. None of the references may be persons related to the applicant or, at the time of application, a partner of or otherwise associated with the applicant in the practice of law. The applicant by his or her application consents to confidential inquiry by the board or appropriate disciplinary body and other persons regarding the applicant's competence and qualifications to be certified as a specialist.

(A) Each specialty committee shall evaluate the information provided by an applicant's references to make a recom-

mentation to the board as to the applicant's qualification in the specialty through peer review. The evaluation shall include a determination of the weight to be given to each peer review and shall take into consideration a reference's years of practice, primary practice areas and experience in the specialty, and the context in which a reference knows the applicant.

(5)

(b)

.1721 Minimum Standards for Continued Certification of Specialists

(a) The period of certification as a specialist shall be five years....To qualify for continued certification as a specialist, a lawyer applicant must pay any required fee, must demonstrate to the board with respect to the specialty both continued knowledge of the law of this state and continued competence, and must comply with the following minimum standards.

- (1) The specialist must make a satisfactory showing, as determined by the board after advice from the appropriate specialty committee, of substantial involvement ~~(which shall be determined in accordance with the principles set forth in Rule .1720(a)(2) of this subchapter)~~ in the specialty during the entire period of certification as a specialist. Substantial involvement for continued certification shall be determined in accordance with the principles set forth in Rule .1720(a)(2) of this subchapter and the specific standards for each specialty. In addition, unless prohibited or limited by the standards for a particular specialty, the following judicial service may be substituted for the equivalent years of practice experience if the applicant's judicial service included presiding over cases in the specialty: service as a full-time state or federal trial, appellate, or bankruptcy judge (including service as a federal magistrate judge); service as a judge for the courts of a federally recognized Indian tribe; service as an administrative law judge for the Social Security Administration; and service as a commissioner or deputy commissioner of the Industrial Commission.

(2)

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 21, 2011.

Given over my hand and the Seal of the North Carolina State Bar, this the 16th day of February, 2012.

s/L. Thomas Lunsford, II

L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 8th day of March, 2012.

s/Sarah Parker

Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 8th day of March, 2012.

s/Jackson, J.

For the Court

**AMENDMENTS TO THE RULES AND REGULATIONS OF THE
NORTH CAROLINA STATE BAR CONCERNING
LEGAL SPECIALIZATION**

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 27, 2012.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning legal specialization, as particularly set forth in 27 N.C.A.C. 1D, Section .1700, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Rules of the Standing Committees of the North Carolina State Bar, Section .1700 The Plan of Legal Specialization

.1725 Areas of Specialty

There are hereby recognized the following specialties:

- (1) bankruptcy law
 - (a) consumer bankruptcy law
 - (b) business bankruptcy law
- (2) estate planning and probate law
- (3) real property law
 - (a) real property—residential
 - (b) real property—business, commercial, and industrial
- (4) family law
- (5) criminal law
 - (a) ~~criminal appellate practice~~
 - (~~b~~) state criminal law
 - (b) juvenile delinquency law
- (6) immigration law
- (7) workers' compensation
- (8) Social Security disability law

(9) elder law

(10) appellate practice.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 27, 2012.

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L. Thomas Lunsford, II, Secretary

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s/Jackson, J.
For the Court

**AMENDMENTS TO THE RULES AND REGULATIONS OF THE
NORTH CAROLINA STATE BAR CONCERNING
LEGAL SPECIALIZATION**

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 27, 2012.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning legal specialization, as particularly set forth in 27 N.C.A.C. 1D, Section .2900, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Rules of the Standing Committees of the North Carolina State Bar, Section .2900 Certification Standards for the Elder Law Specialty

.2905 Standards for Certification as a Specialist in Elder Law

Each applicant for certification as a specialist in elder law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification in elder law:

(a) Licensure and Practice

(d) Continuing Legal Education—An applicant must earn ~~no less than~~ forty-five (45) hours of accredited continuing legal education (CLE) credits in elder law and related fields, as specified in this rule, during the three full calendar years preceding application and the year of application, with not less than nine (9) credits earned in any of the three calendar years. Of the forty-five CLE credits, at least ten (10) credits must be earned attending elder law—specific CLE programs. Related fields shall include the following: estate planning and administration, trust law, health and long term care planning, public benefits, veterans' benefits, surrogate decision-making, older persons' legal capacity, social security disability, Medicaid/Medicare claims, special needs planning and taxation. No more than twenty (20) credits may be earned in the related fields of estate taxation or estate administration

(e) Peer Review

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 27, 2012.

Given over my hand and the Seal of the North Carolina State Bar, this the 16th day of March, 2012.

s/L. Thomas Lunsford, II

L. Thomas Lunsford, II, Secretary

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s/Sarah Parker

Sarah Parker, Chief Justice

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This the 8th day of March, 2012.

s/Jackson, J.

For the Court

**AMENDMENT TO THE RULES AND REGULATIONS OF THE
NORTH CAROLINA STATE BAR CONCERNING
PREPAID LEGAL SERVICES PLANS**

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 27, 2012.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning prepaid legal services plans, as particularly set forth in 27 N.C.A.C. 1E, Section .0300, be amended as follows (additions are underlined, deletions are interlined):

**27 N.C.A.C. 1E, Regulations for Organizations Practicing Law,
Section .0300 Rules Concerning Prepaid Legal Services Plans**

.0308 Registration Fee

The initial and annual registration fees for each prepaid legal services plan shall be \$100. The fee is nonrefundable.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 27, 2012.

Given over my hand and the Seal of the North Carolina State Bar, this the 16th day of February, 2012.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84, of the General Statutes.

This the 8th day of March, 2012.

s/Sarah Parker

Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 8th day of March, 2012.

s/Jackson, J.

For the Court

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ADMINISTRATIVE LAW

Judicial review of consent order—not a final agency decision—The trial court correctly concluded that it did not have subject matter jurisdiction over petitioners' request for judicial review of a consent order concerning coastal residential insurance rates. The relevant statutory provisions of Chapter 58 of the North Carolina General Statutes and the Administrative Procedure Act are construed *in pari materia*, so that a request for judicial review pursuant to N.C.G.S. § 58-2-75 may only be taken from an agency decision or final agency decision. The consent order here was not an agency decision with respect to petitioners because they were not "the person making the filing" or "a person intervening in the filing." **Dare Cnty. v. N.C. Dep't of Ins., 600.**

APPEAL AND ERROR

Appeal noted orally—treated as motion for certiorari—An appeal from an order requiring defendant to enroll in lifetime satellite-based monitoring that was noted orally in open court was not sufficient to confer jurisdiction on the Court of Appeals, but was considered as a petition for *certiorari* and was granted in the interests of justice. **State v. Cowan, 192.**

Appealability—amended summary judgment order—certification added—beyond correction of clerical error—writ of certiorari granted—The trial court lacked the authority to amend its summary judgment order to add a certification allowing immediate appeal through reliance on its authority to correct clerical errors under N.C.G.S. § 1A-1, Rule 60(a). The appeal from this portion of the summary judgment order was dismissed, but the record and briefs were treated as a petition for *certiorari*, which was granted. **Newcomb v. Cnty. of Carteret, 527.**

Defense of laches—not plead before the trial court—Respondent's argument that the trial court did not err in dismissing petitioner's interstate petition for child support based on the doctrine of laches was dismissed where respondent did not plead the defense of laches before the trial court. **State ex rel. Boggs v. Davis, 359.**

Denial of motion to suppress—properly preserved—Defendant properly preserved for appellate review the denial of his motion to suppress evidence. Defendant specifically reserved his right to appeal the denial of the motion to suppress before entering his guilty plea and properly gave oral notice of appeal. **State v. Banner, 729.**

Denial of summary judgment—prescriptive easement—Plaintiffs were not entitled to seek immediate appellate review of the trial court's decision to deny them summary judgment on a prescriptive easement issue as a matter of right. Further, plaintiffs' request for a writ of *certiorari* was denied. **Newcomb v. Cnty. of Carteret, 527.**

Interlocutory order—arbitration denied—substantial right affected—A challenge to the denial of defendant's motion to stay proceedings and compel arbitration was properly before the Court of Appeals even though the order was interlocutory. The denial of arbitration involved a substantial right which might have been lost if the appeal was delayed. **Ellison v. Alexander, 401.**

Interlocutory order—award of attorney fees—amount to be determined—An appeal from an award of attorney fees may not be brought until the

APPEAL AND ERROR—Continued

trial court has finally determined the amount to be awarded unless appellant makes a showing that waiting for the final determination would affect a substantial right. Here, the appeal from an interlocutory order did not affect a substantial right and was dismissed. **Triad Women's Ctr., P.A. v. Rogers, 353.**

Interlocutory order—denial of motion to admit pro hac vice attorney—no substantial right—Plaintiff's appeal from the trial court's denial of her motion for admission of an out-of-state attorney to practice *pro hac vice* was dismissed as interlocutory. The trial court's order did not involve a substantial right and was not appealable as a matter of right because parties do not have a right to be represented in the courts of North Carolina by counsel who are not duly licensed to practice in this state. **Dance v. Manning, 520.**

Interlocutory order—immediately appealable—certified under Rule 54(b)—affected a substantial right—The Court of Appeals considered the merits of plaintiff's appeal from an interlocutory order partially granting defendant's motion to dismiss in a breach of contract case. The trial court certified the order under Rule 54(b) of the Rules of Civil Procedure and the order affected a substantial right because the same factual issues were involved in the claims which were dismissed and the claims which remained and if the appeal was not immediately heard, different juries could reach different results thereby rendering inconsistent verdicts on the same factual issues. **Signature Dev., LLC v. Sandler Commercial at Union, L.L.C., 576.**

Interlocutory order—partial summary judgment—certified by trial judge—The Court of Appeals had jurisdiction to review a partial summary judgment in a wrongful death action arising from an automobile accident where the only remaining claim was against an estate and the trial court certified the summary judgment order pursuant to N.C.G.S. § 1A-1, Rule 54(b). **Lunsford v. Renn, 298.**

Interlocutory order—personal jurisdiction—An appeal from a dismissal for lack of personal jurisdiction was from an interlocutory order but was heard because defendant properly proceeded under N.C.G.S. § 1-277(b). **Smith Architectural Metals, LLC v. Am. Railing Sys., Inc., 151.**

Interlocutory order—risk of inconsistent verdict—In an action arising from a collision between a truck and a moped, an appeal from the dismissal of plaintiff's negligent entrustment claim was from an interlocutory order because a negligence claim survived, but was considered because there was the possibility of inconsistent verdicts. **Haynie v. Cobb, 143.**

Interlocutory order—substantial right—immunity—While the denial of a summary judgment motion is typically an interlocutory order, a claim based on immunity affects a substantial right and is entitled to immediate review. **Hunter v. Transylvania Cnty. Dep't of Soc. Servs., 735.**

Interlocutory order—substantial right—possibility of inconsistent verdicts—Although defendants' appeal from the denial of their counterclaims for unfair and deceptive trade practices and fraud was from an interlocutory order, the right to avoid the possibility of two trials on the same issues with the possibility of inconsistent verdicts based on overlapping factual issues affected a substantial right, thus allowing for immediate review. **McGuire v. Dixon, 330.**

APPEAL AND ERROR—Continued

Lack of jurisdiction—untimely appeal—The Court of Appeals did not have jurisdiction to review defendant's challenge to the revocation of his probation in the trial court's 27 October 2008 order based on defendant's failure to make a timely appeal. **State v. Yonce, 658.**

Mootness—appeal dismissed—Respondent intervenor's appeal from the superior court's order reversing the New Hanover County Board of Commissioners' order, which denied the application of Carolina Marina and Yacht Club, LLC for a special use permit, was dismissed as moot. Respondent intervenor's purpose in bringing her appeal was plainly to prevent the special use permit from being issued to Carolina Marina and that relief could no longer be granted. **Carolina Marina & Yacht Club, LLC v. New Hanover Cnty. Bd. of Comm'rs, 250.**

Mootness—school board policy not followed—corrected next year—A high school student's appeals from his assignment to an alternative learning center were not moot. The fact that he was offered the required superintendent-level hearing for the next year's school assignment was irrelevant because his appeal concerned only the assignment for the prior year. **In re Rone v. Winston-Salem/Forsyth Cnty. Bd. of Educ., 618.**

Motion for appropriate relief denied—effective assistance of counsel—Defendant's motion for appropriate relief asserting that his trial counsel failed to provide him with constitutionally effective representation was denied. Defendant failed to demonstrate that the documentation upon which he now relied could have been produced at either hearing. **State v. Yonce, 658.**

Motion to dismiss appeal—timely notice of appeal—adjudication order—Petitioner's motion to dismiss respondent's appeal from an order adjudicating her minor children neglected and dependent was denied. An order of disposition, and the adjudication order upon which it is based, become final orders which may be appealed from pursuant to N.C.G.S. § 7B-1001 when the disposition order is entered. Respondent timely appealed from the adjudication and disposition orders within 30 days of the entry of the disposition order. **In re J.N.S., 670.**

Partial summary judgment—interlocutory order—directed verdict—final order—The denial of a motion for partial summary judgment was not a final order and was not reviewed on appeal, but the subsequent directed verdict was final and the directed verdict standard of review applied. **Bodine v. Harris Vill. Prop. Owners Ass'n, 52.**

Plain error review—prior objection to another witness—not sufficiently contemporaneous—Defendant did not timely object to testimony about the nature of prior warrants on which he was being arrested when he struggled with the officer, and the appellate review was for plain error only. Defendant objected when the arresting officer testified, but the evidence was actually given subsequently without objection by another officer. **State v. Wilson, 492.**

Preservation of issues—failure to argue—The Court of Appeals declined to address defendant's remaining issues that he conceded had already been resolved by the Court of Appeals. Defendant failed to advance any further arguments. **State v. May, 260.**

Preservation of issues—failure to appeal issue—failure to file assignment of error—A motion in the Court of Appeals to strike defendant Cobb's

APPEAL AND ERROR—Continued

brief and reply brief was granted where defendant Cobb did not file a notice of appeal regarding the alleged error nor assignments of error, and the case did not qualify for one of the four situations when a reply brief is considered. **Haynie v. Cobb, 143.**

Preservation of issues—failure to argue—The remaining assignment of error that defendant failed to argue was deemed abandoned under N.C. R. App. P. 28(b)(6). **State v. Terry, 311.**

Preservation of issues—failure to make motion to strike testimony—Although defendant contended that the trial court erred in a statutory rape, second-degree rape, and incest case by allowing a pediatrician to testify as to her opinion of the minor victim's truthfulness, this argument was not preserved. Even assuming defendant properly objected to the testimony he did not make a motion to strike. Further, defendant failed to object to the State repeating the question or the answer. **State v. Dye, 473.**

Preservation of issues—failure to make timely objection—Although defendant contended the trial court erred in a felony breaking and entering case by denying defendant's objection to the victim's in-court identification of defendant, this argument was not preserved for appeal under N.C. R. App. P. 10(b)(1). The untimely objection was not made until well after the question and answer, and defendant failed to argue plain error on appeal. **State v. Rawls, 415.**

Preservation of issues—failure to object at trial—Although defendant contended the trial court erred in a delivery of a counterfeit controlled substance case by permitting the State to read a portion of defendant's indictment to the jury in violation of N.C.G.S. § 15A-1221(b), defendant waived this argument under N.C. R. App. P. 10(b)(1) by failing to object at trial. **State v. Ross, 379.**

Preservation of issues—failure to object at trial—failure to argue plain error—Although defendant contended the trial court erred by considering an SBI agent's visual identification of a white pill found in defendant's master bedroom as Methadose to be sufficient evidence to charge defendant with possession of a schedule II controlled substance, this argument was dismissed based on defendant's failure to object to the testimony and failure to argue plain error. **State v. Terry, 311.**

Preservation of issues—failure to timely object at trial—Although defendant contended in a delivery of a counterfeit controlled substance case that the trial court violated its statutory duties under N.C.G.S. § 15A-1234(c) to inform the parties generally of the instructions it intended to give the deadlocked jury and afford them an opportunity to be heard, defendant waived this argument under N.C. R. App. P. 10(b)(1) by failing to timely object at trial. Defendant's argument did not fit within the exception under N.C.G.S. § 15A-1446(d)(12). Further, defendant failed to argue plain error. **State v. Ross, 379.**

Statement of facts—rules violations—not a substantial failure—The merits of plaintiff's appeal were considered despite appellate rules violations concerning the statement of facts where the violations did not impair the task of review and did not rise to the level of a gross violation. **Mosteller v. Duke Energy Corp., 1.**

Writ of certiorari—jurisdiction—insufficient oral notice of appeal from satellite-based monitoring order—Although defendant's oral notice of appeal

APPEAL AND ERROR—Continued

from the trial court's order enrolling defendant in satellite-based monitoring was insufficient to confer jurisdiction on the Court of Appeals, the Court granted defendant's petition for writ of *certiorari* to address the merits of his appeal under N.C. R. App. P. 21. **State v. Williams, 499.**

ARBITRATION AND MEDIATION

Arbitration clause—Subscription and Shareholder Agreements—enforceable—Defendant was entitled to enforce an arbitration clause in Subscription and Shareholder Agreements (SSAs) and the trial court's order denying defendant's motion to compel arbitration was reversed. Plaintiffs' claims arose in connection with the SSAs and defendant was acting in his capacity as a representative of the company when he allegedly made the misrepresentations upon which the claims rested. **Ellison v. Alexander, 401.**

ATTACHMENT

Application for dissolution—remanded—Appellee Wells Fargo's application to dissolve an order of attachment obtained by plaintiff was remanded to the trial court because the trial court did not rule on the application. **Signature Dev., LLC v. Sandler Commercial at Union, L.L.C., 576.**

Erroneous dissolution—not related to claim of lien—action pending—The trial court erred in dissolving an order of attachment obtained by plaintiff pursuant to N.C.G.S. § 1-440.3 because the order was not related to a stricken claim of lien and plaintiff's breach of contract action was pending. **Signature Dev., LLC v. Sandler Commercial at Union, L.L.C., 576.**

ATTORNEY FEES

Homeowners association—violation of covenants—Attorney fees awarded to a homeowners association were not authorized pursuant to N.C.G.S. § 47F-3-120 because they did not involve the imposition of an assessment, the only basis for such charges in the declaration or bylaws. However, these charges were permitted by N.C.G.S. § 47F-3-102 (12) and N.C.G.S. § 47F-3-116, which permitted the imposition of fines for violations of the declarations, bylaws, rules, and regulations of the association. **Bodine v. Harris Vill. Prop. Owners Ass'n, 52.**

Modification of alimony—dependant spouse—no error—The trial court did not err in concluding that plaintiff was entitled to attorney fees pursuant to N.C.G.S. § 50-16.4. Plaintiff was the dependent spouse, entitled to a modification of alimony, and did not have sufficient means to defray necessary expenses as her current expenses outweighed her income. **Martin v. Martin, 121.**

BURGLARY AND UNLAWFUL BREAKING OR ENTERING

First-degree burglary—acting in concert—sufficient evidence—The trial court did not err by denying defendant Wilkins' motion to dismiss the charge of first-degree burglary. The evidence was sufficient to establish that the four perpetrators, including defendant Wilkins, entered the residence with a common plan or purpose and that defendant Clagon's assault was in pursuance of the common purpose or was a natural or probable consequence thereof. **State v. Clagon, 346.**

First-degree burglary—sufficient evidence—The trial court did not err by denying defendant Clagon's motion to dismiss the charge of first-degree burglary because the evidence was sufficient to establish that defendant intended to commit assault with a deadly weapon inflicting serious injury upon entering the victim's residence. **State v. Clagon, 346.**

Instructions—first-degree burglary—no plain error—The trial court's instruction to the jury regarding the specific intent element of first-degree burglary did not rise to the level of plain error. When viewed in its entirety, the trial court's instructions were clear that the underlying felony for the first-degree burglary charge was assault with a deadly weapon inflicting serious injury and not assault with a deadly weapon. **State v. Clagon, 346.**

No instruction defining nighttime—not plain error—There was no plain error in a burglary prosecution where the trial court did not instruct the jury on the definition of nighttime. Although there was some conflicting evidence, it could not be said that the jury probably would have reached a different verdict had the instruction been given. **State v. Reavis, 218.**

Sufficient evidence—The trial court did not err in a felonious breaking or entering, felonious larceny, and felonious possession of stolen goods case by failing to dismiss the charges for insufficient evidence. There was sufficient evidence of all the elements of the offenses, including defendant's identity as one of the perpetrators and the possession element of the possession of stolen goods charge. **State v. Szucs, 694.**

Sufficiency of evidence—nighttime—There was sufficient evidence that an offense occurred during nighttime to support a burglary conviction, aside from conflicting testimony from the victim, where there was also evidence from the 911 tape, the victim's statement to officers, the crime scene technician at the scene, and a record from the U.S. Naval Observatory to which defendant stipulated. **State v. Reavis, 218.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Adjudication—consent order—no direct inquiry of respondent required—preservation of issue—The trial court did not err by failing to directly inquire of respondent whether she assented to a consent order adjudicating her minor children neglected and dependent and instead relying on the assent of her attorney. Moreover, respondent failed to object to the entry of the consent order and did not preserve the issue for appeal. **In re J.N.S., 670.**

Appeal from permanency planning order—age of majority—An appeal from a permanency planning order was dismissed as moot where the child had reached the age of majority. **In re B.G., 745.**

Disposition order—cessation of reunification efforts—inadequate findings—The trial court erred in an abuse, neglect, and dependency proceeding by ordering the Department of Social Services to file a petition to terminate respondent's parental rights, effectively determining that reunification efforts between respondent and her minor children should cease, without making the requisite findings of fact under N.C.G.S. § 7B-507. **In re J.N.S., 670.**

Findings not supported by competent evidence—conclusions not supported by findings—The trial court's conclusions of law and ultimate disposition were not supported by the findings of fact and the disposition order was

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

vacated. The trial court did not err in making findings of fact based on reports from the guardian *ad litem* and the Department of Social Services and those findings were supported by the evidence. However, the trial court's findings of fact based on statements made by the parties and other individuals who had not been duly sworn were not based on competent evidence. **In re J.N.S., 670.**

Neglected juvenile—permanency planning order—findings of fact—The trial court's challenged findings of fact in a permanency planning order were supported by the evidence. **In re P.O., 35.**

Neglected juvenile—permanency planning order—The trial court did not fail to comply with the provisions of N.C.G.S. § 7B in a permanency planning proceeding. The trial court established guardianship as the permanent plan for the juvenile, established the rights and responsibilities that remained with respondent, and entered an order consistent with its findings ordering guardianship of the juvenile. **In re P.O., 35.**

Neglected juvenile—permanency planning review hearing—The trial court erred by failing to provide for a permanency planning review hearing in a permanency planning proceeding and failed to satisfy the requirements of N.C.G.S. § 7B-906(b). The matter was remanded for additional findings of fact. **In re P.O., 35.**

CHILD CUSTODY AND SUPPORT

Interstate child support petition—verification—Respondent's argument that the trial court did not err in dismissing petitioner's interstate petition for child support based on petitioner's failure to verify the petition in accordance with N.C.G.S. § 52C-3-310 was overruled because there was no authority requiring a notary public commissioned in Louisiana to print or type his name to verify a petition for child support. **State ex rel. Boggs v. Davis, 359.**

CITIES AND TOWNS

Denial of variance—appellate review—whole record test—Petitioner's argument that the Town of Cary's denial of a variance from the riparian buffer requirement was not supported by competent, material, and substantial evidence was overruled because the whole record test did not allow the Court of Appeals to replace the Town's judgment. **Cary Creek Ltd. P'ship v. Town of Cary, 339.**

Denial of variance—superior court review—findings of fact not prejudicial—scope of appellate review—The superior court did not err in affirming the decision of respondent Town of Cary which denied petitioner's request for a variance. Although the superior court was without authority to make additional findings of fact, the superior court's inclusion of such findings was not prejudicial error. The Court of Appeals declined to consider whether the superior court's findings were supported by competent evidence because the scope of appellate review was limited to whether the evidence before the town board supported its action. The Court of Appeals also declined to consider petitioner's challenge to the Town's procedure because petitioner failed to raise the issue in its petition for writ of *certiorari*. **Cary Creek Ltd. P'ship v. Town of Cary, 339.**

High speed chase—wrongful death—town's insurance policy—not ambiguous—Summary judgment was properly entered for a town and its police

CITIES AND TOWNS—Continued

officers in a wrongful death claim arising from a high-speed chase where there was no ambiguity about the Town's insurance policy, despite plaintiffs' contentions. **Lunsford v. Renn, 298.**

CIVIL PROCEDURE

Newly discovered evidence—denial of motion to consider—The trial court did not abuse its discretion by denying a motion to introduce newly discovered evidence under N.C.G.S. § 1A-1, Rule 60(b)(2) in a third-party tort action that had been settled and was awaiting determination of the employer's workers' compensation lien. Respondents filed the motion after the hearing but before a written order had been issued, so that they were attempting to put new evidence before the court in the rendering of the final order rather than seeking relief from an order. Even if the motion had been properly denominated, the trial court did not abuse its discretion in denying the request. **Kingston v. Lyon Constr., Inc., 703.**

Rule 52—motion for additional findings—full relief granted—The trial court did not exceed its authority under N.C.G.S. § 1A-1, Rule 52(b) when, in response to plaintiff's motion for additional findings and conclusions, the court amended its order to relieve plaintiff entirely of a prior memorandum of judgment and formal order, as plaintiff had originally sought in her motion. There was sufficient evidence in plaintiff's motion for the additional findings. **Autry v. Autry, 514.**

Rule 60—findings—supported by record—The record supported the trial court's finding of fact in a proceeding under N.C.G.S. § 1A-1, Rule 60 that plaintiff or her counsel reasonably relied on a comment by defense counsel that a mortgage was no longer a lien against a house. **Autry v. Autry, 514.**

Rule 60—specific section identified—There was no lack of clarity about the section of N.C.G.S. § 1A-1, Rule 60(b) upon which the trial court relied in issuing an order relieving plaintiff of a memorandum of judgment in an action for alimony and related issues. The court specifically stated that the statements made by defendant's attorney constituted "factual misrepresentation," a basis enumerated in Rule 60(b)(3). **Autry v. Autry, 514.**

COLLATERAL ESTOPPEL AND RES JUDICATA

Prior lawsuit—dismissed without prejudice—no final judgment on the merits—The trial court erred in granting defendant's motion for judgment on the pleadings in a negligence action on the basis of collateral estoppel. The previous lawsuit concerning the same parties and subject matter was dismissed without prejudice and did not result in a final judgment on the merits. **Estate of Means v. Scott Elec. Co., Inc., 713.**

COMPROMISE AND SETTLEMENT

Settlement agreement—procured through misrepresentation—could not be ratified—A settlement agreement procured by a misrepresentation could not be ratified by a partial execution because the fault in the judgment was one party's alleged wrongdoing in forming the agreement. **Autry v. Autry, 514.**

CONFESSIONS AND INCRIMINATING STATEMENTS

Motion to suppress—involuntary confession—videotape—The trial court did not err in a robbery case by suppressing defendant's videotaped confession. A confession obtained as a result of an officer's promise to testify on behalf of a defendant that aroused in defendant a hope of lighter punishment rendered the confession involuntary. Although not determinative of the case, the trial court erred by determining that defendant's *Miranda* rights were violated when defendant voluntarily spoke with a detective after signing a document indicating that he understood his rights. **State v. Bordeaux, 645.**

CONSTITUTIONAL LAW

Due process—assignment to alternative learning center—evidentiary hearing not offered—The due process rights of a high school student were violated where he was assigned to an alternative learning center without a superintendent-level review at which he could present evidence or cross-examine witnesses. The Board-level hearing later provided to petitioners was essentially an appellate hearing, conducted in this case without the superintendent-level or evidentiary hearing. **In re Rone v. Winston-Salem/Forsyth Cnty. Bd. of Educ., 618.**

Effective assistance of counsel—instruction not requested—different outcome improbable—There was no ineffective assistance of counsel in not requesting an instruction on the definition of nighttime in a burglary prosecution where it was highly improbable that there would have been a different result had the instruction been given. **State v. Reavis, 218.**

Ex post facto—satellite-based monitoring—There was no merit to defendant's contention that state and federal constitutional prohibitions of *ex post facto* laws were violated by an order subjecting him to lifetime enrollment in satellite-based monitoring (SBM) despite the fact that the SBM regime did not exist when he committed the acts which led to his conviction. **State v. Cowan, 192.**

Ex post facto laws—double jeopardy—no violation for enrollment in satellite-based monitoring—A defendant's enrollment in satellite-based monitoring (SBM) did not violate the prohibitions against *ex post facto* laws and double jeopardy. SBM is a civil remedy, and thus, application of SBM provisions do not violate the *ex post facto* clause. Further, double jeopardy does not apply since SBM is a civil regulatory scheme and not a punishment. The Court of Appeals declined to take judicial notice of the North Carolina Department of Correction Interim Policy. **State v. Williams, 499.**

Right to confrontation—testimony about autopsy findings—participation by testifying doctor—Even assuming *arguendo* that defendant preserved his constitutional objection to a doctor giving his opinion on the cause of death based on an autopsy and findings by another doctor, defendant's argument failed because the testifying doctor also participated in the autopsy. **State v. Blue, 267.**

Search and seizure—search incident to arrest—order for arrest valid—The trial court did not err in denying defendant's motion to suppress evidence seized as a result of a search of defendant incident to arrest for his failure to appear in court due to his imprisonment. The underlying charges that formed the basis for the arrest order remained unresolved at the time the order was executed and the recall of the order was not mandatory under N.C.G.S. § 15A-301(g)(2). Because the arrest was valid, the search incident to arrest was also valid. **State v. Banner, 729.**

CONSTRUCTION CLAIMS

Breach of contract—general contractor—control test—action not dismissed—Defendant's arguments that the trial court's order partially dismissing plaintiff's complaint in fact dismissed plaintiff's entire complaint or, in the alternative, that the trial court erred by failing to dismiss plaintiff's complaint in its entirety were not addressed because the Court of Appeals concluded that the trial court erred in partially dismissing plaintiff's complaint. **Signature Dev., LLC v. Sandler Commercial at Union, L.L.C.**, 576.

Breach of contract—general contractor—control test—erroneous dismissal—The trial court erred in partially granting defendant's motion to dismiss in a breach of contract case based on the trial court's finding that plaintiff was an unlicensed general contractor. Plaintiff did not exercise the requisite control over a development project to be considered a general contractor and thus was not required to be licensed under N.C.G.S. § 87-1. **Signature Dev., LLC v. Sandler Commercial at Union, L.L.C.**, 576.

CONTRACTS

Breach—repudiation—The trial court erred by denying summary judgment for defendant on a repudiation of contract claim arising from a real estate transaction where plaintiff made clear that it intended to close in accordance with the contract and did not treat defendant Ammons' letter as a repudiation until Ammons tendered the deed. **Profile Invs. No. 25, LLC v. Ammons East Corp.**, 232.

Breach of contract—indemnity clause inapplicable—summary judgment proper—The trial court did not err in granting summary judgment in favor of defendant on plaintiffs' breach of contract claim arising from an alleged breach of an indemnity provision. No party contended that there was any material issue of fact in dispute and plaintiffs failed to allege facts or forecast any evidence that tended to support a finding that the claim for which they sought to be indemnified stemmed from defendant's acts or omissions. **One Beacon Ins. Co. v. United Mech. Corp.**, 483.

Breach of contract—unjust enrichment—written agreement—no oral modification—summary judgment proper—The trial court did not err in granting summary judgment in favor of plaintiff on its breach of contract and unjust enrichment claims arising out of a dispute over a custom-manufactured roofing and insulation system. The parties were bound by the original terms of a written purchase order and credit agreement, and no substitute oral agreement had been reached. Moreover, defendant M&M Builders, Inc. breached the terms of the agreement by failing to pay for the custom roof. **Thermal Design, Inc. v. M&M Builders., Inc.**, 79.

Breach of contract—unjust enrichment—mitigation of damages—summary judgment proper—The trial court did not err in granting summary judgment in favor of plaintiff on its breach of contract and unjust enrichment claims arising out of a dispute over a custom-manufactured roofing and insulation system as there was no genuine issue of material fact concerning whether plaintiff took reasonable steps to mitigate its damages. **Thermal Design, Inc. v. M&M Builders., Inc.**, 79.

COSTS

Appeal—taxed against plaintiffs' counsel—failure to submit complete record—The costs of plaintiffs appeal from the trial court's order granting summary judgment in favor of two defendants was taxed against plaintiffs' counsel, personally. Plaintiffs' counsel failed to include in the record on appeal the orders of the trial court disposing of plaintiffs' claims against the other defendants to show that the orders granting summary judgment in favor of defendant-appellees were final judgments. **Waddell v. Metropolitan Sewage Dist. of Buncombe Cnty.**, 129.

Expert witness fees—modification of alimony—dependant spouse—error—The trial court erred in awarding plaintiff expert witness fees in a modification of alimony case. Plaintiff's expert was not subpoenaed to testify and there is no statutory authority in N.C.G.S. § 50-16.4 for the imposition of expert fees. **Martin v. Martin**, 121.

CRIMINAL LAW

Denial of motion for mistrial—victim outbursts during closing arguments—The trial court did not abuse its discretion by denying defendant's motion for a mistrial made after the jury's verdict in a statutory rape, second-degree rape, and incest case based on the victim's outbursts during defense counsel's closing arguments. The trial court took immediate action to respond to the outburst, eventually banned the victim from the courtroom, and provided defendant with an opportunity to make any motions or request further instructions during the trial. **State v. Dye**, 473.

Guilty plea—habitual felon—not invalid—The trial court did not err by accepting defendant's oral guilty plea to being an habitual felon. In accordance with *State v. Williams*, 133 N.C. App. 326, the trial court's failure to inform defendant of the maximum and minimum sentences did not invalidate defendant's plea. **State v. Szucs**, 694.

Jury instructions—acting in concert—first-degree murder—assault with deadly weapon with intent to kill inflicting serious injury—The trial court did not err in a first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury case by instructing the jury on acting in concert. It was undisputed that defendant was present at the scene and there was sufficient evidence that defendant and another individual were shooting at the victims pursuant to a common plan or purpose. **State v. Gabriel**, 440.

Self-defense—instruction—prior threats insufficient—The trial court did not err in a first-degree murder case by denying defendant's request for an instruction on self-defense. Although the record established that the victim had threatened defendant repeatedly, the record was devoid of any evidence that the victim ever attempted to actually harm defendant. Prior threats, without more, were not sufficient to establish the existence of a reasonable need to use deadly force. **State v. Pittman**, 205.

DEEDS

Restrictive covenants—homeowners association approval of structure—In a homeowners association (HOA) action that was filed after the effective date of the 2005 revisions of the Planned Community Act, the trial court did not err by granting defendant HOA a directed verdict in a declaratory judgment action with

DEEDS—Continued

the central issue of whether the HOA had approved a structure on plaintiffs' property before construction began. There was no set of facts or circumstances under which plaintiffs could show approval. **Bodine v. Harris Vill. Prop. Owners Ass'n, 52.**

DIVORCE

Alimony—modification of alimony—change of circumstances—dependent spouse—no error—The trial court did not err in concluding that plaintiff was entitled to an increase in monthly alimony payments from defendant. The trial court's findings of fact were supported by competent evidence, and those findings supported the conclusion that a change of circumstances required modification of the alimony order. **Martin v. Martin, 121.**

DRUGS

Motion to dismiss—sufficiency of evidence—constructive possession of drugs—The trial court did not err by denying defendant's motions to dismiss the charges of felony possession of marijuana with intent to manufacture, sell, or deliver; felony possession of a Schedule II controlled substance; felony keeping or maintaining a dwelling for keeping a controlled substance; and misdemeanor possession of drug paraphernalia based on alleged insufficient evidence that defendant possessed the controlled substances seized at his residence. There were sufficient incriminating circumstances of constructive possession including that defendant lived at and owned a possessory interest in the residence, he shared the bedroom where drugs were found, and he made statements concerning the drugs. **State v. Terry, 311.**

Possession of cocaine—sale of cocaine—insufficient evidence that substance was cocaine—lay opinion testimony—The trial court erred in denying defendant's motion to dismiss the charges of possession with intent to sell and deliver cocaine and sale of cocaine where the sole evidence that the substance that formed the basis of the charges was cocaine consisted of lay opinion testimony from the charging police officer and an undercover informant based on their visual observation of the substance. Because the evidence required to establish that the substance at issue was in fact a controlled substance must have been expert witness testimony based on a scientifically valid chemical analysis and not mere visual inspection, the evidence was insufficient to establish that the substance at issue was cocaine. **State v. Nabors, 463.**

EASEMENTS

Construction of harbor—control of permanent structures—The trial court correctly concluded that Carteret County had the right to control installation and repair of permanent structures in Marshallberg Harbor where the original easement granted broad and unambiguous rights to the County with the intention that the Harbor function as a public rather than a private asset, and a subsequent easement to the federal government for construction of the Harbor did not disturb those rights. **Newcomb v. Cnty. of Carteret, 527.**

ESTOPPEL

Judicial estoppel—positions not factually inconsistent—The trial court erred in granting defendant's motion for judgment on the pleadings in a negligence action on the basis of judicial estoppel. Plaintiffs did not take positions in

ESTOPPEL—Continued

a previous lawsuit and the present lawsuit that were *factually* inconsistent so the doctrine of judicial estoppel did not apply. **Estate of Means v. Scott Elec. Co., Inc., 713.**

EVIDENCE

Dead Man's Statute—exclusion of oral statements harmless error—A *de novo* review revealed that although the trial court erred in a caveat proceeding by excluding oral communications between propounder and decedent based on its failure to find that a waiver had occurred under N.C.G.S. § 8C-1, Rule 601(c), the Dead Man's Statute, the evidence was tangential, at best, on the issue of undue influence. Further, the jury heard the same or similar evidence during the course of the trial. **In re Will of Baitschora, 174.**

Dead Man's Statute—no waiver of protection—The trial court did not err in a wills case by excluding an affidavit submitted by defendant Jackson and thereafter granting the executor's partial summary judgment motion. The executor did not waive the applicability of N.C.G.S. § 8C-1, Rule 601(c) because he did not seek to elicit evidence of oral communications between the decedent and the opposing parties. **Weeks v. Jackson, 242.**

Erroneous admission of laboratory reports—failure to serve notice of intent to use reports—Defendant was entitled to a new trial in a possession with intent to sell cocaine and selling cocaine case based on the trial court's erroneous admission of two laboratory reports. Defendant was not served with notice of the State's intent to use the laboratory reports as evidence of the identity, nature, and quantity of any and all controlled substances or alleged controlled substances seized as required by N.C.G.S. § 90-95(g). Prior to 15 June 2009, the State should have served any notices to defendant personally. Introduction of the first laboratory report was error and the introduction of the second laboratory report was plain error. **State v. Blackwell, 255.**

Expert testimony—sexual abuse of child—secondary gain—no prejudicial error—The trial court did not commit plain error in a statutory rape, second-degree rape, and incest case by permitting a pediatrician's testimony regarding secondary gain. Even assuming *arguendo* that the testimony was erroneously admitted and that it impermissibly bolstered the minor's testimony, the error did not arise to plain error given the overwhelming evidence of defendant's guilt. **State v. Dye, 473.**

Extrinsic evidence—impeachment—not improper—The trial court did not err by admitting into evidence the transcript of a witness's out-of-court statements to the police to impeach his testimony. The witness's statements were material and his testimony was inconsistent in part with his prior statements. **State v. Gabriel, 440.**

Hearsay—internal affairs report—no plain error—There was no plain error in a prosecution arising from a struggle following an attempted arrest where the results of an internal affairs investigation that cleared the officer were admitted. The evidence of the offenses arising from the attempted arrest was overwhelming and defendant could not meet his burden of showing that evidence of the investigation altered the outcome of the trial. **State v. Wilson, 492.**

EVIDENCE—Continued

Hearsay—officer testimony—drug neighborhood—no plain error—The trial court did not commit plain error in a delivery of a counterfeit controlled substance case by allowing an officer to characterize the neighborhood where the drug transaction allegedly occurred as a “high drug location” and an “open air market for drugs.” It was unlikely that the jury’s verdict would have been different absent this evidence in light of the substantial evidence of defendant’s guilt. **State v. Ross, 379.**

Hearsay—permanency planning hearing—no abuse of discretion—The trial court did not abuse its discretion by refusing to admit into evidence at a permanency planning hearing documents that were hearsay. While hearsay evidence may be admitted at a permanency planning hearing, given respondent’s failure to offer any explanation as to why the authors of the documents were not present at trial to testify, or to offer any support for her contention that the documents were reliable, and given the Department of Social Service’s strenuous objections to the documents based on lack of authenticity and reliability, the trial court’s exclusion of the hearsay evidence was not so arbitrary that it could not have been the result of a reasoned decision. **In re P.O., 35.**

Impeachment—probative value not outweighed by prejudicial effect—The trial court did not err by admitting into evidence the transcript of a witness’s out-of-court statements to the police to impeach his testimony. The probative value of the transcripts was not substantially outweighed by the dangers of unfair prejudice, confusion of the issues, or misleading the jury. **State v. Gabriel, 440.**

Motion to suppress—constitutional grounds—first raised at trial—Defendant’s constitutional objection at trial to admission of an interview with a detective, treated as a motion to suppress, was not timely made and the assignment of error was overruled. The legal grounds upon which defendant sought the exclusion of the evidence were constitutional, so that a pretrial motion to suppress was required, but defendant did not make such a motion and the exceptions that would allow the motion for the first time at trial did not apply. **State v. Reavis, 218.**

Motion to suppress statements—sheriff’s department—no reasonable expectation of privacy—marital privilege inapplicable—The trial court did not err in a drugs case by denying defendant’s motion to suppress statements made by defendant and his wife at the sheriff’s department. Defendant did not have a reasonable expectation of privacy when there were warning signs that the premises were under audio and visual surveillance, and thus, the marital privilege was inapplicable. **State v. Terry, 311.**

Nature of prior warrants—no plain error—There was no plain error in admitting testimony about the nature of the warrants on which defendant was being arrested when he struggled with the officer. The evidence against defendant was substantial and the violent nature of the crimes in the arrest warrants was relevant to understanding both the states of mind and actions of defendant and the officer. **State v. Wilson, 492.**

Photographs—illustrative purposes—later considered as substantive evidence—The trial court did not err in a breach of contract case by relying on photographs as substantive evidence when they were originally admitted for illustrative purposes. The trial court could properly revisit its prior evidentiary ruling. Further, defendant had the opportunity to cross-examine a witness about the photographs. **Accelerated Framing, Inc. v. Eagle Ridge Builders, Inc., 722.**

EVIDENCE—Continued

Prior offenses—opened door—The trial court did not err by admitting evidence of defendant's prior offenses during cross-examination of defendant's psychiatrist where defendant opened the door on direct examination. **State v. Reavis, 218.**

Transcript of out-of-court statements—impeachment—not as subterfuge for inadmissible hearsay—The trial court did not err by admitting into evidence the transcript of a witness's out-of-court statements to the police to impeach his testimony. The circumstances indicated that the State called the witness to testify in good faith and not as a subterfuge to put his otherwise inadmissible hearsay before the jury. **State v. Gabriel, 440.**

HOMICIDE

First-degree murder—motion to dismiss—sufficiency of evidence—premeditation and deliberation—The trial court did not err by denying defendant's motion to dismiss the charge of first-degree murder. The State offered evidence, through defendant's own statement, that he formed the intent to kill his grandmother and contemplated whether he would be caught before he began the attack. Although there was evidence presented that defendant had consumed alcohol and cocaine prior to his assault on the victim, the evidence did not establish that his intoxication was such as to negate the possibility of premeditation and deliberation as a matter of law. **State v. Blue, 267.**

Voluntary manslaughter—jury instruction—defendant as the aggressor—The trial court did not commit plain error when it instructed the jury that it could find defendant guilty of voluntary manslaughter if the jury found that defendant was the aggressor as there was sufficient evidence in the record of defendant being the aggressor. **State v. Effler, 91.**

Voluntary manslaughter—jury instruction—no duty to retreat—no plain error—The trial court did not commit plain error in a murder trial by failing to instruct the jury *ex mero motu* that defendant had no duty to retreat in the curtilage of his home. While the trial court's failure to include the instruction was erroneous, the jury would have reached the same verdict even if the jury had been instructed that defendant did not have a duty to retreat. **State v. Effler, 91.**

Voluntary manslaughter—sufficient evidence—no error—The trial court did not err by denying defendant's motion to dismiss the charge of voluntary manslaughter because the State presented sufficient evidence that defendant was the aggressor and that defendant used excessive force. **State v. Effler, 91.**

IDENTIFICATION OF DEFENDANTS

Plain error—testimony about defendant's mug shot—The trial court did not commit plain error in a felonious breaking or entering, felonious larceny, and felonious possession of stolen goods case by failing to exclude testimony from a police officer that he had found defendant's photograph in a database containing mug shots. While the comment was inadvisable, it was insignificant within the larger context of the officer's testimony. **State v. Szucs, 694.**

Showup—motion to suppress evidence—not unduly suggestive—no substantial likelihood of irreparable misidentification—The trial court did not err in a felony breaking and entering case by denying defendant's motion to suppress evidence arising out of a showup. The showup procedure was not unduly

IDENTIFICATION OF DEFENDANTS—Continued

suggestive, and a totality of circumstances test revealed that there was no substantial likelihood of irreparable misidentification. The victim had a meaningful opportunity to view the suspect face-to-face only a table's length away and was asked to identify him 10 to 15 minutes later. **State v. Rawls, 415.**

Showup—motion to suppress pretrial identification—Eyewitness Identification Reform Act inapplicable—The trial court did not err in a felony breaking and entering case by denying defendant's motion to suppress the victim's pretrial identification of defendant based on its conclusion that the Eyewitness Identification Reform Act (EIRA) under N.C.G.S. § 15A-284.52 does not apply to showup identifications. The EIRA details procedural requirements officers must follow for a photo lineup or live lineup where a group of people are displayed to the eyewitness. In contrast, a showup is the showing of suspects singly to witnesses for purposes of identification. **State v. Rawls, 415.**

IMMUNITY

Police officers—high speed chase—public official immunity—A police officer was entitled to public official immunity in his individual capacity in a wrongful death action arising from a high speed chase. Plaintiffs did not forecast evidence demonstrating that the officer acted maliciously, wantonly, or recklessly in his pursuit of a driver who was driving recklessly when the pursuit began. **Lunsford v. Renn, 298.**

Public official immunity—social worker—The trial court erred in a wrongful death case by denying defendant Department of Social Services (DSS) social worker's motion to dismiss and granting plaintiff partial summary judgment on the issue of defendant's defense of public official immunity. Based on the underlying circumstances of defendant's role at DSS and her role in the investigation, she was a representative of the State who was vested with and exercised discretion consistent with those who qualify as public officials. Thus, the public official doctrine barred plaintiff's claim against defendant in her individual capacity. **Hunter v. Transylvania Cnty. Dep't of Soc. Servs., 735.**

INDICTMENT AND INFORMATION

First-degree burglary indictment—not defective—Defendant Wilkins' argument that an indictment for first-degree burglary was defective because it failed to identify the specific intended felony upon which the burglary charge was based was overruled. An indictment for first-degree burglary satisfies the requirements of N.C.G.S. § 15A-924(a)(5) even if it does not specify the felony the defendant intended to commit. **State v. Clagon, 346.**

Short-form indictments—constitutionality—first-degree murder—first-degree rape—Short form indictments were sufficient to charge a defendant with first-degree murder and first-degree rape. **State v. Blue, 267.**

INSURANCE

Underinsured motorist coverage—no selection form—opportunity consciously rejected—Summary judgment was properly entered for plaintiff-insurer in a declaratory judgment action to determine whether defendant was entitled to underinsured motorist (UIM) coverage. Despite the lack of a selection/rejection

INSURANCE—Continued

form, there was no dispute that the co-holder of the policy had the opportunity to reject or select different UIM coverage limits. **N.C. Farm Bureau Mut. Ins. Co. v. Jenkins, 506.**

JUDGES

One judge overruling another—no change of circumstances—An order granting defendant's third motion for summary judgment was vacated where there was no indication that the trial court made the change of circumstances determination necessary for one superior court judge to overrule another. **Profile Invs. No. 25, LLC v. Ammons East Corp., 232.**

JUDGMENTS

Foreign judgments—enforcement—subject matter jurisdiction—The trial court erred in enforcing an Ohio judgment rendered in accordance with the terms of a demand cognovit promissory note (note) because the Ohio court did not have subject matter jurisdiction to enter the judgment. The statutory requirement that the warning language in the note appear in such type size or distinctive marking that it appear more conspicuously than anything else on the document was not met. **In re Gardner v. Tallmadge, 282.**

JURISDICTION

Minimum contacts—attempts to resolve problem without litigation—Defendant First Line did not possess sufficient minimum contacts with North Carolina for personal jurisdiction where it had no contact with North Carolina prior to an email to a North Carolina corporation (Smith Metals) detailing its efforts to assess and remedy a problem on railings it had painted for another out-of-state corporation (American Railing). It would “offend traditional notions of fair play and substantial justice” to allow our courts to obtain personal jurisdiction solely on the basis of sincere attempts to remedy the situation without resort to litigation. **Smith Architectural Metals, LLC v. Am. Railing Sys., Inc., 151.**

Personal jurisdiction—sufficient minimum contacts—no due process violation—The trial court did not err in denying defendant's motion to dismiss an action arising out of a swimming pool construction agreement for lack of personal jurisdiction. Defendant was subject to jurisdiction in North Carolina under N.C.G.S. § 1-75.4 and defendant had sufficient minimum contacts with North Carolina to justify personal jurisdiction. The trial court's findings of fact were supported by competent evidence, which in turn supported its conclusion of law that the court's jurisdiction of this action over defendant did not violate due process. **Bauer v. Douglas Aquatics, Inc., 65.**

Subject matter jurisdiction—interstate child support petition—two dismissal rule inapplicable—The trial court erred in finding and concluding that petitioner voluntarily gave notice of dismissal on two separate occasions, which operated as an adjudication on the merits pursuant to Rule 41 of the North Carolina Rules of Civil Procedure, and in dismissing the petition for lack of subject matter jurisdiction. Rule 41 was not implicated where petitioner voluntarily dismissed the action on one occasion but the second dismissal was entered by order of the court granting respondent's motion to dismiss. **State ex rel. Boggs v. Davis, 359.**

JURY

Alleged juror misconduct—motion to replace juror denied—The trial court did not err by denying defendant's motion to replace a juror. Nothing suggested that the juror had spoken with other jurors about her thoughts, shared a note addressed to the judge with anyone else, or participated in any kind of misconduct. **State v. Boyd, 632.**

Deliberations—bailiff delivered requested exhibit to jury room—failure to bring jury back to courtroom—Although the trial court technically violated N.C.G.S. § 15A-1233(a) in a delivery of a counterfeit controlled substance case by instructing the bailiff to deliver a requested exhibit to the jury room during deliberations with the instruction “we need that back” without bringing the jury back to the courtroom for the instruction, it was not prejudicial error. “We need that back” was not a communication regarding material matters of the case. Further, the bailiff was a sworn officer of the court whose normal duties included conveying certain communications between the court and the jury. **State v. Ross, 379.**

Deliberations—deadlocked—trial court comments did not coerce verdict—The trial court did not commit plain error in a delivery of a counterfeit controlled substance case by its instructions and remarks to a deadlocked jury. The trial court's comments did not have the effect of coercing the jury to reach a verdict, and the totality of circumstances revealed that a second *Allen* instruction was not required. Some of the trial court's comments were not subject to plain error review as they were not jury instructions, but instead were discretionary rulings by the trial court. Further, the trial court should have refrained from entering the jury room during deliberations to discuss the jury's progress to avoid the possibility of improperly influencing the jury. **State v. Ross, 379.**

Researching legal terms on Internet—new trial denied—The trial court did not abuse its discretion by denying defendant's motion for a new trial based on alleged juror misconduct without making further inquiry where several jurors admitted looking up legal terms on the Internet during the trial. Definitions of legal terms are not extraneous information and did not implicate defendant's constitutional right to confront witnesses against him. **State v. Patino, 322.**

JUVENILES

Delinquency—suppression of statements—custodial interrogation—failure to give Miranda warnings—failure to give warnings required by statute—The trial court committed reversible error in a juvenile delinquency case by denying the juvenile's motion to suppress statements he made to the principal of his school and a deputy. The juvenile made the statements in the course of a custodial interrogation without having been afforded the warnings required by *Miranda* and N.C.G.S. § 7B-2101(a), and the juvenile was not apprised of and afforded his right to have a parent present, in violation of his constitutional and statutory rights. **In re K.D.L., 453.**

Disposition level—probation violation—minor offense—A juvenile level 3 disposition and commitment order following a probation violation was remanded for a new hearing and entry of a level 2 disposition and order. N.C.G.S. § 7B-2508(g) does not override the explicit directive in N.C.G.S. § 7B-2510(f) and allow the court to enter a new level 3 disposition following a probation violation based upon a minor offense. **In re S.B., 741.**

LIENS

Materialman's lien—not attached for lost profits—The trial court did not err in striking plaintiff's claim of lien against the property at issue because a materialman's lien does not attach for lost profits. **Signature Dev., LLC v. Sandler Commercial at Union, L.L.C.**, 576.

NEGLIGENCE

Contributory negligence—summary judgment proper—The trial court did not err by granting summary judgment in favor of defendants on plaintiffs' negligence claim arising out of a fatal sledding accident. The evidence presented at the summary judgment hearing clearly established that plaintiffs' decedent was contributorily negligent in sledding down a hill and colliding with an open and obvious above-ground manhole. **Waddell v. Metropolitan Sewage Dist. of Buncombe Cnty.**, 129.

Highway utility pole—placement not negligence per se—The trial court did not err by granting defendant's Rule 12(b)(6) motion to dismiss a claim for negligence *per se* in which plaintiff sought damages for injuries suffered when the car in which she was a passenger went off a road and struck a Duke Energy utility pole. The North Carolina Department of Transportation (NCDOT) has the duty and responsibility to consider all of the relevant factors at each location and to establish where utility structures should be located. Without an allegation that NCDOT had determined that the utility pole was in an unapproved location, plaintiff did not adequately plead that her injuries were proximately caused by defendant's negligence *per se*. **Mosteller v. Duke Energy Corp.**, 1.

Placement of utility pole—not ordinary negligence—The trial court did not err by granting defendant's Rule 12(b)(6) motion to dismiss plaintiff's ordinary negligence claim for injuries suffered when the car in which she was riding went off the road and struck a Duke Energy utility pole. The maintenance of a utility pole does not constitute negligence unless the pole is a hazard to those using the highway in a proper manner. Here, the negligence of the driver in leaving the roadway was an intervening proximate cause. **Mosteller v. Duke Energy Corp.**, 1.

PARTIES

Necessary parties—trust beneficiaries—A partial summary judgment in a trust action was remanded where beneficiaries whose interests would be affected were not included as parties. **Hasselmann v. Barnes**, 373.

Real party in interest—stipulation—The trial court had subject matter jurisdiction in a breach of contract case even though defendant contended that plaintiff was not the real party in interest since it did not sign the pertinent contract. The parties stipulated that plaintiff was a party to the contract, and it was binding since defendant never filed a motion to set aside the stipulation. Although defendant further contended that plaintiff could not sue since it was not authorized to do business in North Carolina, defendant failed to make a motion under N.C.G.S. § 55-15-02(a), thus waiving this argument. **Accelerated Framing, Inc. v. Eagle Ridge Builders, Inc.**, 722.

PLEADINGS

Amendment—petition for review of administrative ruling—The trial court did not err by allowing petitioners to amend their petition for judicial review pursuant to N.C.G.S. § 1A-1, Rule 15(a) to assert that a student was improperly assigned to an alternative school. Although respondent contended that the Administrative Procedure Act has no mechanism for amending a petition, the Rules of Civil Procedure apply when a differing procedure is not prescribed by statute. **In re Rone v. Winston-Salem/Forsyth Cnty. Bd. of Educ., 618.**

Motion to amend—awareness of claim—no prejudice—The trial court did not abuse its discretion by allowing petitioners' motion to amend where respondent was aware of petitioners' claim more than a month before the superior court hearing and was not materially prejudiced by the timing of the amendment. **In re Rone v. Winston-Salem/Forsyth Cnty. Bd. of Educ., 618.**

Previous lawsuit—judgment on pleadings—collateral estoppel—res judicata—The trial court did not err in a negligence suit by considering pleadings filed in a previous lawsuit concerning the same parties and subject matter in determining whether to grant defendant's Rule 12(c) motion on the basis of collateral or judicial estoppel. Moreover, even if the trial court had erred by considering the pleadings in the prior action, the proper remedy would have been to review the ruling under a Rule 56 summary judgment standard. **Estate of Means v. Scott Elec. Co., Inc., 713.**

Substance of claim—negligent entrustment—The trial court erred by dismissing a claim for negligent entrustment where plaintiff moved to amend his complaint to add that claim, the amendment was never ruled upon, plaintiff took a voluntary dismissal, and plaintiff refiled a complaint that included the negligent entrustment claim. Plaintiff's original complaint alleged the elements necessary to put defendant on notice of the negligent entrustment claim. **Haynie v. Cobb, 143.**

POLICE OFFICERS

High-speed chase—no gross negligence—police and town officials—not liable—Summary judgment was properly granted for a police chief, a lieutenant, and the town in a wrongful death action that arose from a high-speed chase where there was no gross negligence in the chase itself. **Lunsford v. Renn, 298.**

High-speed chase—wrongful death action—no gross negligence—The trial court properly granted summary judgment for an officer in his official capacity in a wrongful death action that arose from a high-speed chase where the evidence did not show that the officer acted in a wanton or reckless manner. Plaintiffs' evidence on gross negligence boiled down to the contention that the officer was reckless in continuing to pursue a driver whose dangerous driving began before the pursuit and who was a danger to the community whether pursued by police or not. Such a holding would all but preclude an officer's ability to pursue a suspect driving recklessly and attempting to evade police. **Lunsford v. Renn, 298.**

POSSESSION OF STOLEN GOODS

Felony larceny—felony possession of stolen goods—erroneous judgment for both charges—The trial court erred by entering judgment for both felony larceny and felony possession of stolen goods as the legislature did not intend to punish a defendant for possession of the same goods that he stole. **State v. Szucs, 694.**

PROBATION AND PAROLE

Probation violation—failure to pay restitution—Although defendant timely appealed from the 8 December 2008 order, defendant failed to show the trial court abused its discretion by committing defendant to the custody of the Department of Correction at the conclusion of the hearing. Defendant had already been found in willful violation of the conditions of his probation and had been given a one month reprieve to make the required restitution payments. The record was devoid of any evidence explaining any specific reason that defendant was unable to make the required payments. **State v. Yonce, 658.**

RAPE

First-degree rape—second-degree rape—motion to dismiss—sufficiency of evidence—penetration—The trial court did not err by denying defendant's motion to dismiss the charge of first-degree rape and the lesser-included offense of second-degree rape. There was sufficient independent physical evidence establishing the trustworthiness of defendant's statement that he had sex with his grandmother, thus satisfying the element of penetration. **State v. Blue, 267.**

ROBBERY

Dangerous weapon—motion to dismiss—sufficiency of evidence—continuous transaction—The trial court did not err by denying defendant's motion to dismiss the charge of robbery with a dangerous weapon. There was no evidence that defendant had his grandmother's permission to take money from her wallet. The evidence was sufficient to show the theft and the use of force were part of a continuous transaction. The rape of the victim did not constitute a break in the chain of events. Further, the elements of the use of force by a dangerous weapon endangering the victim's life were established by independent evidence corroborating defendant's confession. **State v. Blue, 267.**

SATELLITE-BASED MONITORING

Enrollment in lifetime satellite-based monitoring—sexually violent offense—taking indecent liberties with child—recidivist—The trial court did not err by requiring defendant to enroll in lifetime satellite-based monitoring. Although findings 1 and 5 were not supported by competent evidence, the order was supported by necessary findings and was not itself erroneous. **State v. Williams, 499.**

Applicable date of statute—The trial court did not err by using N.C.G.S. § 14-208.40B as the procedural vehicle for determining whether defendant should be required to enroll in satellite-based monitoring (SBM). That statute applies to SBM proceedings initiated after 1 December 2007 even if those proceedings involved offenders who had been sentenced or had committed their offenses before that date. **State v. Cowan, 192.**

Clerical error—The Court of Appeals treated defendant's brief as a petition for *writ of certiorari* and determined that the trial court did not err by requiring him to enroll in a satellite-based monitoring program for the duration of his natural life upon his release from incarceration. The case was remanded for the limited purpose of correcting a clerical error on Form AOC-CR-615 by marking Box 1(b) and unmarking Box 1(a). **State v. May, 260.**

SATELLITE-BASED MONITORING—Continued

Eligibility—solicitation to take indecent liberties—Assuming that eligibility for satellite-based monitoring (SBM) should be determined based on the elements of the offense rather than on the event, solicitation to take an indecent liberty with a minor (the offense of which defendant was convicted) inherently involves the physical, mental, or sexual abuse of a minor as required for SBM. **State v. Cowan, 192.**

Notice—inadequate—Defendant did not receive adequate notice of the Department of Correction's preliminary determination that he should be required to enroll in satellite-based monitoring where the notice did not specify the category of N.C.G.S. § 14-208.40(a) into which the Department had determined that defendant fell, nor did it briefly state the factual basis for the conclusion. **State v. Cowan, 192.**

SCHOOLS AND EDUCATION

Alternative learning center—review of assignment—plain language of policy—The trial court erred by concluding that a school board policy that required a superintendent-level review before a student was confined to an alternative learning center did not apply in this case. The plain language of the school board policies revealed that they applied to students assigned to alternative learning programs as an alternative to suspension or expulsion. **In re Rone v. Winston-Salem/Forsyth Cnty. Bd. of Educ., 618.**

Assignment to alternative learning center—policy not followed—remedy—Under school policy, an assignment to an alternative learning center as an alternative to suspension could necessarily only last until the completion of that school year. An appellate determination that the assignment was erroneously made could no longer affect that assignment, nor could the Court of Appeals grant petitioners' request that the student be ordered back into the regular classroom immediately. However, the case was remanded for expungement of the assignment to the alternative program from the student's record. **In re Rone v. Winston-Salem/Forsyth Cnty. Bd. of Educ., 618.**

SEARCH AND SEIZURE

Motion to suppress—DNA sample—The trial court did not err by denying defendant's motion to suppress a DNA sample taken from him while he was in custody in Ohio. Defendant's consent was voluntary even though he was unaware that the crimes for which he was being investigated were of a sexual nature. A reasonable person in defendant's position would have believed that the DNA could be used generally for investigative purposes. **State v. Boyd, 632.**

Motion to suppress drugs—"knock and announce" entry—exigent circumstances—The trial court did not err in a drugs case by denying defendant's motion to suppress evidence seized at his home as a result of a search warrant based on an alleged improper "knock and announce" before entering the premises. When the purpose of the search warrant was to search for illegal drugs, the time between law enforcement's "knock and announce" and their entry into the residence may be reduced. **State v. Terry, 311.**

SENTENCING

Aggravated range—trial court comments taken out of context—The trial court did not err in a second-degree murder case by sentencing defendant within the aggravated range based on the victim's great suffering prior to her death. Although defendant contended the trial court took into account a nonstatutory aggravating factor that was neither stipulated to nor found by a jury beyond a reasonable doubt, taken in context, the trial court's comments that the State had made a significant concession in not charging defendant with first-degree murder were in response to comments made by defense counsel during the proceeding regarding defendant's good character and reputation. **State v. Shaw, 369.**

Habitual felony—failure to redact statements from transcript of plea not prejudicial error—Although the trial court erred in the habitual felon phase of a trial by refusing to redact challenged statements on the transcript of plea for defendant's predicate felony, defendant failed to demonstrate how the evidence prejudiced him given the overwhelming and uncontradicted evidence of the three prior felony convictions. **State v. Ross, 379.**

Prior record level—calculation error—new sentencing hearing—The trial court erred in calculating defendant's prior record level and the matter was remanded for a new sentencing hearing. By failing to meet the requirements of N.C.G.S. § 15A-1340.14(f)(1)-(4), the State failed to meet its burden in proving that the convictions listed on defendant's prior record level worksheet existed at the time of sentencing. Further, the prosecutor's in-court statement and accompanying prior record level worksheet were insufficient to prove defendant's prior convictions without a stipulation. **State v. Boyd, 632.**

SEXUAL OFFENSES

Second-degree sexual offense—mentally disabled victim—sufficient evidence—The trial court did not err in denying defendant's motion to dismiss a charge of second-degree sexual offense because the State presented substantial evidence of all the elements of the offense, including that the victim was mentally disabled and that defendant knew or should reasonably have known that the victim was mentally disabled. **State v. Williams, 136.**

Sexual battery—evidence of intent—sufficient—The trial court did not err by denying defendant's motion to dismiss a charge of sexual battery for insufficient evidence that the contact was for the purpose of sexual arousal, sexual gratification, or sexual abuse. In the light most favorable to the State, the evidence supported an inference that defendant grabbed the victim for those purposes. **State v. Patino, 322.**

STATUTES OF LIMITATION AND REPOSE

Sealed instrument—extended limitations period—A *de novo* review revealed that the trial court erred by concluding that defendants' counterclaims for fraud and unfair and deceptive trade practices were barred by N.C.G.S. §§ 1-52(9) and 75-16.2. The ten-year statute of limitation under N.C.G.S. § 1-47(2) should have been applied to the counterclaims given that the promissory notes and modification agreement were signed under seal and conveyed an interest in real property. **McGuire v. Dixon, 330.**

TERMINATION OF PARENTAL RIGHTS

Appointment of guardian ad litem for parent—no abuse of discretion—The trial court did not abuse its discretion by not appointing respondent mother a guardian *ad litem sua sponte* in a termination of parental rights proceeding. There was no allegation of dependency as a ground for termination, no allegation that respondent mother's substance abuse and mental health issues resulted in a diminished capacity or rendered her incompetent to participate in the proceedings, and nothing in the proceedings raised a question regarding respondent mother's competency. **In re S.R., 102.**

Best interest of the juveniles—statutory factors considered—no abuse of discretion—The trial court did not abuse its discretion in terminating respondent mother's parental rights where evidence in the record indicated that the trial court considered all of the statutory factors under N.C.G.S. § 7B-1110(a) before determining that termination of parental rights was in the best interest of the juveniles. **In re S.R., 102.**

WATERS AND ADJOINING LANDS

Creation of harbor—riparian rights—In a case arising from the creation of Marshallberg Harbor, the trial court correctly granted summary judgment for plaintiffs on riparian rights issues. The extent to which plaintiffs had riparian rights in Marshallberg Harbor did not hinge upon whether the harbor was natural or manmade; given that Marshallberg Harbor was clearly capable of navigation by watercraft, the owners of property bordering the harbor clearly have riparian rights in its waters. **Newcomb v. Cnty. of Carteret, 527.**

WILLS

Caveat proceeding—instruction—fiduciary relationship—The trial court did not err in a caveat proceeding in its jury instruction regarding a fiduciary relationship. The trial court instructed the jury on the legal consequences of a principal-agent relationship, if one existed, and then treated the issue as a factual matter for jury resolution. The instruction properly placed the burden of proof on caveator. **In re Will of Baitschora, 174.**

Motion for new trial—properly denied—plain language unambiguous—The trial court did not abuse its discretion in denying plaintiffs' motion for a new trial in a wills case as the trial court properly found that the terms of the will were unambiguous. **Buchanan v. Buchanan, 112.**

Plain language unambiguous—no error—The trial court did not err in concluding that defendant received from decedent's will an estate for years in decedent's house, defendant had exclusive possession of the house, and plaintiffs received a vested remainder in the same property. The plain language of the will was unambiguous. **Buchanan v. Buchanan, 112.**

WITNESSES

Motion to sequester—explanation of denial—not required—A trial court was not required to explain to the parties its discretionary ruling on a motion to sequester. **State v. Patino, 322.**

Motion to sequester—motion denied—collusion or tailoring not suspected—The trial court did not abuse its discretion by denying defendant's motion to sequester witnesses where defendant offered as grounds only that there were a

WITNESSES—Continued

number of witnesses and that the crime had happened almost a year before the trial. Defense counsel did not explain or give specific reasons at trial to suspect that the witnesses would tailor their testimony, and did not argue that the unsequestered witnesses actually colluded with each other or influenced each other's testimony. **State v. Patino, 322.**

WORKERS' COMPENSATION

Average weekly wage—remanded—findings of fact to support recalculation—After considering defendants' petition for rehearing and additional briefs submitted in a workers' compensation case stemming from plaintiff's exposure to asbestos, the Court of Appeals concluded that the Industrial Commission failed to make adequate findings of fact and conclusions of law concerning the calculation of plaintiff's average weekly wage. The case was remanded to the Industrial Commission for recalculation of plaintiff's average weekly wage and appropriate findings of fact to support that recalculation. **Pope v. Johns Manville, 157.**

Disability—earning capacity—credibility of expert—Plaintiff's argument that the Industrial Commission erred in finding that plaintiff's expert did not offer an opinion regarding plaintiff's earning capacity and in concluding that plaintiff was not disabled was overruled. The Commission is the exclusive judge of credibility and it was within its authority to give little weight to plaintiff's expert's testimony. **Nobles v. Coastal Power & Elec., Inc., 683.**

Lien against settlement proceedings—subject matter jurisdiction—The trial court did not lack subject matter jurisdiction to rule on a motion for determination of a workers' compensation lien for third-party settlements where only some of the third-party claims had been settled. A final settlement agreement between an employee and a third party was necessary to invoke the jurisdiction conferred by N.C.G.S. § 97-10.2(j); here, the settlements were final and enforceable under contract principles and have been performed, binding the parties. The possibility of future settlements has no effect on the enforceability of the settlements already reached. **Kingston v. Lyon Constr., Inc., 703.**

Lien against third-party settlement—reduced to zero—no abuse of discretion—The trial court did not err by reducing to zero workers' compensation liens by the employer against third-party tortfeasors where the findings evidenced the trial court's thorough consideration of the necessary statutory factors and amply supported its conclusion. The possibility of future settlements did not impair the trial court's consideration of the net recovery from the present settlements or impair its ability to balance the equities in making its determination. **Kingston v. Lyon Constr., Inc., 703.**

Suitable employment refused—supported by the evidence—The Industrial Commission's conclusion that plaintiff unjustifiably refused defendant's multiple offers of a suitable fleet manager's assistant position was supported by the findings of fact, which was in turn supported by competent evidence of record. **Nobles v. Coastal Power & Elec., Inc., 683.**

Timeliness of claim—interrelated injuries and conditions—The Industrial Commission correctly determined that plaintiff failed to file her workers' compensation claim in a timely manner and that her claims should be dismissed. Plaintiff, a nurse, began experiencing foot pain in 1992 and filed her first workers'

WORKERS' COMPENSATION—Continued

compensation claim in 2001, which she conceded was time-barred; she filed another claim in 2007 for tarsal tunnel syndrome and Achilles tendinopathy; and she contended that these were new disabilities because the prior episodes had resolved. In instances in which an employee claims to have multiple interrelated and continuous conditions affecting the same part of the body, the employee has only one workers' compensation claim rather than several. **Johnston v. Duke Univ. Med. Ctr.**, 428.

Woodson and Pleasant exceptions—evidence not sufficient—Summary judgment was correctly granted for an employer and co-worker defendants on wrongful death claims brought under the *Woodson* and *Pleasant* exceptions to the exclusivity provisions of the Workers' Compensation Act. Plaintiff did not forecast evidence that defendants knew that their actions were substantially certain to cause serious injury or death, and there was evidence that one of the defendants had been hired after a safety guard had been removed from a shredder and was not aware of the increased danger. **Valenzuela v. Pallet, Express, Inc.**, 364.

ZONING

Denial of variance—town's findings sufficient—The Town of Cary's findings, which served as the bases for its denial of petitioner's variance request, were sufficient to inform the Court of Appeals of what induced the Town's decision, and the superior court correctly applied *de novo* review to this issue. **Cary Creek Ltd. P'ship v. Town of Cary**, 339.

Rezoning—auto park—common law vested right—failure to show substantial expenditures in good faith reliance on governmental approval—The trial court erred in a zoning case by granting summary judgment in favor of plaintiffs on their claim of a common law vested right to develop an auto park notwithstanding the rezoning of the pertinent property. Plaintiffs did not make substantial expenditures in good faith reliance on governmental approval of their proposed automobile dealership project. The case was remanded for entry of summary judgment in favor of defendants. **MLC Auto., LLC v. Town of Southern Pines**, 555.

Rezoning—tortious interference with contract—tortious interference with prospective economic gain—failure to show lack of justification—The trial court did not err in a zoning case by granting summary judgment in favor of defendants on plaintiffs' claims for tortious interference with contract and tortious interference with prospective economic advantage. Plaintiffs failed to present any evidence that defendants acted without justification in rezoning the property in accordance with its statutory authority. **MLC Auto., LLC v. Town of Southern Pines**, 555.

